TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 294

ONE 1958 PLYMOUTH SEDAN, PETITIONER,

vs.

PENNSYLVANIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

PETITION FOR CERTIORARI FILED JULY 17, 1964
CERTIORARI GRANTED DECEMBER 7, 1964

SUPREME COURT OF THE UNITED STATES

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INDEX

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[fol. 4]

IN THE COURT OF QUARTER SESSIONS OF PHILADELPHIA COUNTY, PENNSYLVANIA

Miscellaneous Liquor

Condemnation Docket

February Term, 1961—No. 4

COMMONWEALTH OF PENNSYLVANIA,

—VS.—

ONE 1958 PLYMOUTH (PLAZA) SEDAN
Manufacturer's Serial No. LP1N3159,

In possession of:
GEORGE MCGONIGLE,

GEORGE MCGONIGLE
Reputed Owner.

PETITION FOR FORFEITURE—Filed January 23, 1961

To the Honorable, the Judges of the Said Court:

The Petition of the Pennsylvania Liquor Control Board by its Counsel, Russell C. Wismer, Esquire, Special Assistant Attorney General, respectfully represents:

1. That on December 16, 1960 on the highway on Vine Street, west of 6th Street in the City and County of Philadelphia, Commonwealth of Pennsylvania, there was seized by Enforcement Officers of the Pennsylvania Liquor Control Board the following described property, to wit: One 1958 Plymouth (Plaza) Sedan, Manufacturer's Serial No. LP1N3159.

2. That said property is owned by or is reputed to be owned by George McGonigle, residing at 9200 Atlantic Avenue, Margate City, New Jersey, and was at the time of said seizure in the possession of George McGonigle.

[fol. 5] 3. That at the time of said seizure, the above described property had been possessed or used, or was in

tended for use in violations of the terms and provisions of the Pennsylvania Liquor Code of April 12, 1951, P.L. 90.

Wherefore, your petitioner prays that your Honorable Court make an order of forfeiture adjudging the said property forfeited to the Commonwealth of Pennsylvania unless cause be shown to the contrary.

Pennsylvania Liquor Control Board, By its Counsel: Russell C. Wismer, Special Assistant Attorney General.

[fol. 6] *Duly sworn to by Herman Reitman, jurat omitted in printing.*

[fol. 7]

IN THE COURT OF QUARTER SESSIONS OF PHILADELPHIA COUNTY, PENNSYLVANIA

Miscellaneous Liquor

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February Term, 1961—No. 4

COMMONWEALTH OF PENNSYLVANIA,

—VS.—

ONE 1958 PLYMOUTH (PLAZA) SEDAN
Manufacturer's Serial No. LP1N3159,

In possession of:

GEORGE MCGONIGLE,

GEORGE MCGONIGLE
Reputed Owner.

ORDER DISMISSING PETITION FOR FORFEITURE—
October 23, 1961

And Now, to wit, this 23rd day of October, 1961, after hearing upon the Petition for Forfeiture in the above entitled proceeding,

It Is Ordered, Adjudged and Decreed that the Petition for Forfeiture of the 1958 Plymouth (Plaza) Sedan, Manufacturer's Serial No. LP1N3159 is dismissed, and it is directed that the said 1958 Plymouth Sedan be returned to the owner, George McGonigle, who is hereby ordered and directed to pay storage charges attended upon the seizure of said automobile.

By the Court, McClanaghan, J.

[fol. 8]

IN THE COURT OF QUARTER SESSIONS OF
PHILADELPHIA COUNTY
Miscellaneous Liquor
Condemnation Docket
February Term, 1961—No. 4

COMMONWEALTH OF PENNSYLVANIA,

—vs—

ONE 1958 PLYMOUTH (PLAZA) SEDAN
Mfr's Serial No. LP1N3159.

Before: McClanaghan, J.

Present: Russell C. Wismer, Esq., for Commonwealth.
Louis Lipschitz, Esq., for Defendant.

Transcript of Proceedings—July 18, 1961

Philadelphia, Pa.

[fol. 9]

STATEMENT OF COUNSEL

Mr. Wismer: If your Honor please, this is a petition by the Pennsylvania Liquor Control Board first for the forfeiture of a 1958 Plymouth sedan. This car was seized by enforcement officers of the Pennsylvania Liquor Control Board containing three hundred seventy-five bottles, or

slightly over thirty cases of whiskey and wine not bearing Pennsylvania seals. At the time this matter first came before your Honor, which was on the 2nd day of March, 1961, on your liquor list at that time, it was continued at the request of counsel for the reputed owner of the car to a day to be fixed by the Court, and we have now fixed today.

At the time of the hearing on March the 2nd I submitted an affidavit of service of the petition for forfeiture but some how or other it was not kept in the Court record. May I submit that at this time?

The Court: Very well.

Mr. Wismer: An appearance has been entered for McGonigle, the reputed owner, by Mr. Lipschitz.

I am ready to proceed with my testimony.

The Court: Very well.

[fol. 10]

COMMONWEALTH'S EVIDENCE

HERMAN REITMAN, 1009 Foster Road, Philadelphia, Pa., Sworn.

Direct examination.

By Mr. Wismer:

Q. Now, Mr. Reitman, you are an enforcement officer of the Liquor Control Board?

A. Yes, sir,

Q. Did you make the seizure of a 1958 Plymouth sedan registered in the name of one George McGonigle?

A. Yes, sir, I did.

Q. Will you give us, please, the date and time of the seizure?

A. On Friday, December the 16th, 1960 accompanied by Officer Snyder, we stopped and searched this car in question and found it to be loaded with 375 bottles of liquor and wines not bearing the seal of the Commonwealth of Pennsylvania.

Q. What time was that?

A. That was at 6:45 a.m. The car was operated by George McGonigle, who was also the listed owner of the vehicle.

Q. Where did you stop this car?

A. We stopped him on the highway of Vine Street, a bit west of Sixth in Philadelphia. We had followed the vehicle [fol. 11] over the bridge from the Admiral Wilson Boulevard in Camden.

Q. What was the registration number of that car?

A. Pennsylvania registration number 98874B.

Q. When did you first observe this car on the other side of the bridge?

A. Approximately fifteen minutes prior to 6:45 a.m.

Q. Now, when you stopped the car, where was the liquor?

A. We found these bottles of liquor in the rear of the car and in the trunk. The back-rest of the rear seat had been removed and the liquor packed in. We questioned Mr. McGonigle, and he stated—

Mr. Lipschitz: I object to anything Mr. McGonigle said, your Honor.

Mr. Wismer: Well, if your Honor please, he is the registered owner of the automobile and was in possession of the car. I would say that that is perfectly competent testimony.

The Court: I will overrule the objection.

By Mr. Wismer:

Q. Proceed.

A. Mr. McGonigle stated that he had made arrangements with a man known as Charlie to deliver a load of liquor from Margate to Philadelphia for $30.00. He said that on Thursday, December 15, 1960 at 11:00 p.m. he met this [fol. 12] person, Charlie at a dump in Margate, where the transfer of liquor was made from Charlie's car into his Car. He also stated that he had removed the rear seat and back rest of his car and left it lying in the dump. He left Margate at approximately 4:00 in the morning of Friday, December the 16th, 1960 and proceeded directly to Philadelphia, where we stopped him at the highway of

Sixth and Vine. He further stated that he knew it was illegal to haul the liquor into Philadelphia, but he took the chance for $30.00.

Q. Now, how many bottles of liquor were in the car?

A. 375 bottles.

Q. Was that brand liquor, that is, well-known brands?

A. Well, known brands, yes, sir, high-priced liquor.

Q. Did any of this liquor contain Pennsylvania seals?

A. None. They contained seals of the—they were properly packed as far as the Government was concerned.

Q. The Federal Government?

A. Yes, sir, but not as far as the State was concerned.

Q. And did you submit a sample of any of this liquor to the City Chemist?

A. Yes, sir. There was a fifth bottle of Haig and Haig Five Star Scotch was delivered to the chemist and a receipt received from Dr. Edward J. Burke.

Q. Any other?

[fol. 13] A. And a fifth of Seagram's V.O. along with the Haig and Haig Scotch.

Q. What was the chemist's report?

A. It was found to be colored whiskey containing 43.00% by volume of ethyl alcohol.

Q. Now, was McGonigle arrested?

A. Yes, sir. He was placed under arrest, and the liquor and the car were seized.

Mr. Wismer: All right, cross examine.

Cross examination.

By Mr. Lipschitz:

Q. Did you have a search warrant?

A. No, sir, we did not.

Q. Did you have a body warrant for his arrest?

A. No, sir, we did not.

Q. Had you ever seen McGonigle before?

A. No, sir.

Q. Did you have any reason to believe that McGonigle was violating the law before the time that you stopped him?

A. In Camden, yes, sir, we felt that because—

By the Court:

Q. Not you felt. Did you have any reason?

A. Yes, sir. The car was low in the rear, quite low, and that was the reason we followed it into Philadelphia.

[fol. 14] By Mr. Lipschitz:

Q. You had not seen the car before you observed it on the Wilson Boulevard?

A. No, sir, we did not.

Q. So, all you had was a suspicion; is that correct?

A. That's right.

Q. And prior to the time that you stopped this automobile you did not observe it violate the law?

A. No, sir.

Q. Did you at any time obtain a search warrant for this automobile?

A. No, sir.

Q. So, you had no information of any kind concerning McGonigle or the automobile prior to the time that you stopped him?

A. No, sir.

Mr. Lipschitz: That is all.

By Mr. Wismer:

Q. By the way, who was with you, any other officer?

A. Officer Snyder.

JOHN N. SNYDER, 29 Orchard Lane, Norristown, Pa., Sworn.

Direct examination.

[fol. 15] By Mr. Wismer:

Q. Mr. Snyder, you are an enforcement officer of the Liquor Control Board?

A. I am.

Q. Did you hear the testimony that was given by Officer Reitman?

A. I did.

Q. You were with him at the time of the seizure at all times?

A. I was.

Q. Do you corroborate the testimony that he gave?

A. I do.

Q. If the same questions were asked of you in cross examination as were asked of him, would your answers be the same?

A. They would, yes, with one exception.

Q. And that exception is?

A. That I had reason to believe that a late model black four-door sedan, Plymouth, was delivering liquor illegally into Pennsylvania from a dealer in South Jersey.

Mr. Wismer: All right, cross examine.

Cross examination.

By Mr. Lipschitz:

Q. What kind of a car was it?

A. A four-door black Plymouth, late model.

[fol. 16] Q. Where did you get that information?

A. From observations, previous observations.

Q. When did you observe this—did you ever see this automobile before, this Plymouth car involved here?

A. Not that I know of, no.

Q. Did you ever see the man before?

A. No, sir.

Q. So, you had no reason to believe that this car and this man were doing anything illegally?

A. I had reason to believe that this car was doing something illegally, yes.

Q. Well, had you ever seen that car before?

A. It so happened that I never seen it before. I thought I had.

Q. You had never seen this car before?

A. No, sir.

Q. And all that had been described to you was that a car, a black Plymouth, was involved in some kind of a transaction?

A. A four-door sedan.

Q. Who gave you that information?

A. From my own observations.

Q. When did you observe this automobile before?
A. I have never observed this one before.

Mr. Lipschitz: No other questions.
[fol. 17] Mr. Wismer: All right, thank you.
That is our case, your Honor.
The Court: Very well.

(Witness excused.)

STATEMENT OF COUNSEL

Mr. Lipschitz: If your Honor please, my argument opposing this forfeiture is a legal one. It is based primarily on the case of Henry versus the United States, which was recorded in four Legal Edition, Second, 134, where the United States Court decided that a seizure under similar circumstances and an arrest under similar circumstances is illegal. That view of the law was later confirmed on June 19, 1961 in the case of Map versus Ohio. The facts in that case were slightly different because a home was there entered. In the Henry case an automobile was stopped, men were arrested based on suspicion. In both cases the Supreme Court of the United States set aside a conviction and said that the arrest, the search, and the seizure were illegal.

There is another case, if your Honor pleases, on the subject, and that is the case of Patenotte versus United States, which involved an automobile, and the Court of Appeals [fol. 18] for the Fifth Circuit said that there must be a reasonable belief before a man may be stopped, or his automobile may be stopped, before a man may be searched, or his car or premises be searched, that mere suspicion or belief is generally insufficient justification for such a search.

Now, here the officers testified, if your Honor please, they never seen the man or the car before, and one of them testified that all he relied on was suspicion, and suspicion is not probable cause. A probable cause on which a seizure or an arrest may be made is a reasonable belief that the person is actually committing a crime or violating the law. Our Constitution prohibits unreasonable searches and seizures. A search and seizure may be made if a person is committing a crime, and he may be searched if there is

evidence of the crime being committed before the officer. But here the testimony indicates that there was no evidence that any crime was being committed, and it must be as of the time that the man is stopped and not what is later discovered. Justice Douglas said so in the case of Henry versus the United States, and he indicated the fact that the vehicle contained contraband if it appears after the arrest does not indicate and supply the reasonable cause [fol. 19] that must be in existence prior to the stoppage of the individual and prior to the arrest.

There are certain circumstances under which an automobile may be stopped, and Justice Jackson pointed it out in an earlier case and said particularly in regulating traffic where identification is involved. Under those circumstances, where it is a police regulation that is involved, you may stop an automobile; but, here there is no evidence that this automobile was doing anything in violation of the law at the time of the seizure.

If your Honor please, it may be argued to you by the Commonwealth that this law does not apply, that Pennsylvania does not recognize invalidity of search and seizure. Well, that was the law until the Map case on June 19th, 1961, and the Supreme Court there overruled the law that existed in those states which does not apply to the exclusionary rule, I mean the rule that excludes evidence.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: That is illegally obtained, yes, I know.

Mr. Lipschitz: Yes, sir. Now, for those reasons, if your Honor please, I submit that this application for for- [fol. 20] feiture should be dismissed. Now, then there are cases that are cited in the Patenotte Case. In 266 Fed. 2d at Page 650 appears the following statement: The cases have discussed at least five factors, for example, which may be considered by the officers in establishing probable cause for a search: (1) The reputation of our informants reports concerning the occupants. There is no evidence concerning McGonigle's reputation. (2) A like reputation of the vehicle or owners; (3) The condition of the vehicle. There is some suggestion that this vehicle was loaded, but there is nothing here concerning the reputation of the ve-

hicle or the owner. (4) The information from reputable informers as to the existence and legal purpose of the trip. That is not present. (5) The reputation of the location in which they are found. And that is not present.

All of the requirements which would make this either a proper arrest or a proper search and seizure are absent in this case, and I therefore ask that your Honor dismiss the forfeiture request.

The Court: Submit me a memorandum on the cases.

Mr. Lipschitz: Would your Honor extend me the time [fol. 21] until I have the copy of the notes?

The Court: Yes.

Mr. Wismer: If your Honor please, under Section 209 of the Pennsylvania Liquor Code, enforcement officers of the Pennsylvania Liquor Board are entitled to stop and make an arrest on view if they have reasonable grounds to suppose that the man is committing a violation of the Liquor Code or that the car in which he is driving is violating the law.

Now, I believe it is the 21st Amendment to the Federal or United States Constitution, the Repeal Amendment, which places the sole control in the working of the liquor business within the state wherein the liquor is being distributed, sold, or transported. It is solely within the state's authority. Now, I believe that the statement made in this case, which I haven't read, unfortunately, I have only read an excerpt from them from the newspapers, but I do not believe that the legal principles that were set forth in these cases would be valuable here.

The officer stated in his direct testimony that he noticed the car coming in New Jersey and crossing the bridge and [fol. 22] that the car was low in the back. Now, to an enforcement officer in the discharge of his duties, I think that is enough to have him stop that automobile. And particularly is it true when he found what he did in here. I think your Honor can well realize that thirty cases of liquor sitting in the back of a passenger car will make that appear very low in the back. That is what we have here when the officer stopped the car.

The Court: Supposing there had been thirty cases of canned goods?

Mr. Wismer: I would not know the weight, your Honor, of thirty cases of canned goods, but the weight of liquor in my experience and from observing it in other matters of this kind makes the car sit very low. But it is reasonable grounds, I would say to your Honor, for an enforcement officer in the discharge of his duties to stop that car and ask what the man has in it.

Now, it is true that they had no evidence that they had any other or had seen the car before or the man, but a car is coming over the bridge, it is low in the back, and that is their reasonable grounds.

The Court: Suppose it had not been going over the bridge, [fol. 23] it was just going along Market Street here in Philadelphia?

Mr. Wismer: If it were going along Market Street, I think that if the officer were directed to or in that particular area and saw it he would have a perfect right to stop it, yes, sir.

The Court: All right, submit me a memorandum. I will wait for your memorandum, so just as soon as you get to it I will appreciate it.

Mr. Wismer: The next thing we have, your Honor, is the liquor that was in the car.

The Court: Go ahead.

Mr. Wismer: It does not contain Pennsylvania seals. The testimony I will ask you Honor to put in this record would be the testimony given by the enforcement officers who made the seizure. It is liquor that does not bear the seals, cannot be possessed in the Commonwealth. I will, therefore, ask your Honor to decree that that liquor be forfeited. However, there is a criminal case pending, and we have had in recent months experience where the trial judge hearing the liquor case has demanded that the liquor be produced in Court and, therefore, I would ask your Honor to decree a forfeiture of this liquor but hold [fol. 24] up the distribution of it until after the criminal case, and after the criminal case is over I will notify your Honor that the criminal case is over and then you may direct it to whatever hospitals or institutions that you choose.

Mr. Lipschitz: If your Honor please, in behalf of the Defendant, consistent with this application of the Common-

wealth, it is our defense that this evidence be suppressed, the use of the liquor as evidence in any proceeding against the Defendant be suppressed. We are not asking that the liquor be returned to us, but we do have the right—

The Court: I don't have authority in this proceeding to do that, Mr. Lipschitz. I don't like to interfere with someone else's case.

Mr. Wismer: May I submit to your Honor an order for the forfeiture of the car and also an order for the forfeiture of the liquor?

The Court: Very well.

Mr. Wismer: And that you may hold those with the file.

The Court: Very well.

Mr. Lipschitz: I assume your Honor will withhold your decision until we have submitted the briefs.

[fol. 25] The Court: Yes.

[fol. 26] Stenographer's Certificate to foregoing transcript and Judge's approval thereof (omitted in printing).

[fol. 27] IN THE COURT OF QUARTER SESSIONS OF PHILADEEPHIA COUNTY, PENNSYLVANIA

MISCELLANEOUS LIQUOR CONDEMNATION DOCKET
FEBRUARY TERM, 1961—No. 4

COMMONWEALTH OF PENNSYLVANIA,

vs.

ONE 1958 PLYMOUTH (PLAZA) SEDAN Manufacturer's Serial No. LP1N3159,

In Possession of:

GEORGE MCGONIGLE,

GEORGE MCGONIGLE
Reputed Owner.

OPINION—November 30, 1961

This action arose on petition of the Pennsylvania Liquor Control Board praying the court to make an Order of For-

feiture of one 1958 Plymouth (Plaza) Sedan on the basis that at the time of seizure of said automobile it had been possessed or used, or was intended for use, in violation of the terms and provisions of the Pennsylvania Liquor Code of April 12, 1951 P.L. 90. At the time of seizure, the automobile was in the possession of one George McGonigle, the owner, or reputed owner, thereof. The petition stated that on December 16, 1960 on the highway on Vine Street, West of Sixth Street in the City and County of Philadelphia, Commonwealth of Pennsylvania, said automobile was seized by enforcement officers of the Pennsylvania Liquor Control Board. A hearing on the Petition for Forfeiture of said automobile was held on July 18, 1961, and at the conclusion thereof counsel was extended time for the filing of briefs.

The Commonwealth offered the testimony of two enforcement officers who related the circumstances under which they stopped the automobile, searched it, placed the operator of the motor vehicle under arrest, and seized the automobile and the liquor found therein. The Petition for Forfeiture was resisted on the ground that the arrest and [fol. 28] search were invalid and in violation of the constitutional guarantees against unlawful search and seizure. On October 23, 1961 the court dismissed the Petition for Forfeiture of said automobile, and directed that it be returned to the owner, who was directed to pay the storage charges attended upon the seizure of said automobile. From said Order. The Commonwealth has appealed.

At the hearing before the court, enforcement Officer Herman Reitman testified that "on Friday, December 16, 1960, accompanied by Officer Snyder, we stopped and searched this car in question, and found it to be loaded with 375 bottles of liquor and wines, not bearing the seal of the Commonwealth of Pennsylvania". The time and place was 6:45 A.M. on the highway on Vine Street, West of Sixth Street in Philadelphia. The automobile was operated by George McGonigle, the listed owner of said vehicle. The enforcement officer testified that they had followed the vehicle over the bridge (Benjamin Franklin) from the Admiral Wilson Boulevard in Camden. The officer testified that they did not have a search warrant nor a body

warrant for the arrest of said McGonigle, and that they had never seen McGonigle nor the automobile in question before. He stated that all they had was a suspicion based on "The car was low in the rear, quite low, and that was the reason we followed it into Philadelphia". He admitted "They had no information of any kind concerning McGonigle or the automobile prior to the time that they stopped him".

Officer Snyder corroborated the testimony of Officer Reitman who stated "That he had reason to believe that a late model, black, four-door Sedan, Plymouth, was delivering liquor illegally into Pennsylvania from a dealer in South Jersey". He stated that he obtained this information from [fol. 29] his own previous observations, but then admitted he had never before seen the instant automobile nor the driver McGonigle. No other testimony was submitted by the Commonwealth.

The basis for the respondent's resistance to the Petition is that the action of the enforcement officers in stopping the automobile, searching the automobile, arresting the driver, and seizing the automobile and the liquor, was not based on reasonable and probable cause and, therefore, was in violation of the United States Constitution, which prohibits unreasonable searches and seizures.

Section 209 of the Pennsylvania Liquor Code (1951, April 12, P.L. 90, Article II, Section 209) provides that enforcement officers are declared to be peace officers and are given police power and authority throughout the Commonwealth to arrest on view, except in private homes, without warrant, any person actually engaged in the unlawful sale, importation, manufacture or transportation, or having unlawful possession of liquor, alcohol or malt or brewed beverages, contrary to the provisions of the Liquor Act or any other law of the Commonwealth. The Section then provides as follows:

> "Such officers and investigators shall have power and authority, upon reasonable and probable cause, to search for and to seize without warrant or process, except in private homes, any liquor, alcohol and malt or brewed beverages unlawfully possessed, manufac-

tured, sold, imported or transported, and any stills, equipment, materials, utensils, vehicles, boats, vessels, animals, aircraft, or any of them, which are or have been used in the unlawful manufacture, sale, importation or transportation of the same."

Section 601 of said Liquor Code provides that no property rights shall exist in any liquor, alcohol or malt or brewed beverage illegally manufactured or possessed, or in any still, equipment, material, utensil, vehicle, boat, vessel, animals or aircraft used in the illegal manufacture or [fol. 30] illegal transportation of liquor, alcohol or malt or brewed beverages, and the same shall be contraband, and proceedings for its forfeiture to the Commonwealth may, at the discretion of the Board, be instituted in the manner hereinafter provided. No such property when in the custody of the law shall be seized or taken therefrom on any writ of replevin or like process (as amended 1956 April 20 P.L. (1955) 1508 Section 1).

Was there reasonable and probable cause for the enforcement officers stopping the car in question? The officers admitted they had not observed the operator of the vehicle doing anything unlawful. They admitted they acted on suspicion buttressed by their observation that the car was riding low in the rear and that it was a 1958 Plymouth Sedan. Officer Snyder testified "that he had reason to believe that a late model, black, four-door Sedan, Plymouth, was delivering liquor illegally into Pennsylvania from a dealer in South Jersey". There was no testimony that the instant automobile is a four-door, black, Plymouth Sedan. The only testimony was that it is a 1958 model Plymouth Sedan. There was no testimony that the automobile was weighted down. There was no testimony that prior to stopping the automobile, the officers had observed the contents of said automobile, nor that the contents of the automobile were visible to the officers prior to their stopping said automobile. The testimony indicated that to outward appearances, the driver was in no manner violating any law of the Commonwealth. He made no effort to avoid capture or to escape. In a companion petition, the Commonwealth sought forfeiture of the liquor and wine, which were con-

fiscated. The petition was not oposed, and forfeiture was ordered.

Under the circumstances, did the officers have sufficient probable cause to stop the automobile and to effect the [fol. 31] seizure thereof? Were the officers possessed of sufficient facts or information that they could have presented (time and circumstances permitting) to a Magistrate and procured a search warrant? What illegal activity transpired in their view to justify them in stopping the automobile and making an arrest without a warrant? The legality of the arrest, search and seizure depends on the existence of probable cause. Evidence of probable cause need not be evidence such as required to establish guilt of the defendant: Brinegar v. United States, 338 U.S. 160. On the other hand, good faith on the part of the arresting officers is not sufficient to establish probable cause. Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed: Slocey v. Emery, 97 U.S. 642, 645; Director General v. Kastenbaum, 263 U.S. 25, 28.

A leading case is Henry v. United States, 361 U.S. 98. In said case, federal officers investigating a theft from an interstate shipment of whiskey, on two occasions observed cartons being placed in a motorcar, in a residential district, followed and stopped the car, searched the car, found and seized cartons containing radios stolen from an interstate shipment. They placed the petitioner and another man under arrest. The court reversed the conviction of the petitioner on the grounds that there was not probable cause for the arrest leading to the search, that produced the evidence on which the conviction rested.

At page 103 of said Opinion (Henry v. United States), Justice Douglas stated:

> "The prosecution conceded below, and adheres to the concession here, that the arrest took place when the federal agents stopped the car. That is our view on the facts of this particular case. When the officers interrupted the two men and restricted their liberty of movement, the arrest, for the purposes of this case, [fol. 32] was complete. It is, therefore, necessary to

> determine whether at or before that time they had reasonable cause to believe that a crime had been committed. The fact that afterwards contraband was discovered is not enough. An arrest is not justified by what the subsequent search discloses as Johnson v. U.S., supra (333 U.S. 10, 13-15) holds."

The court pointed out that, in the absence of explanation, the rumor of petitioner's involvement in some interstate shipment was practically meaningless, and the actions of the petitioner and his companion, as disclosed by the evidence, would not have been sufficient to justify a Magistrate in issuing a warrant.

The court further stated at page 104:

> "What transpired at or after the car was stopped by the officers is, as we have said, irrelevant to the narrow issues before us. To repeat, an arrest is not justified by what the subsequent search discloses. Under our system, suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that the citizens be subject to easy arrest."

That the doctrine against unlawful search and seizure is less strictly interpreted in the cases of automobiles as opposed to dwellings needs no citation of authority. The cases are many. Yet, the requirement of probable cause is not weakened nor abandoned. The probable cause must be found in the circumstances of the particular situation. The test is whether in the particular circumstances a prudent man was possessed of such factual information or knowledge as opposed to mere suspicion, as to reasonably convince him that a crime had been or was being committed.

In Carroll v. U.S., 267 U.S. 132, when federal officers stopped and searched a car they *knew* to be involved in bootlegging, the officers had no warrant but the search and seizure was upheld, for the reason that the officers had probable cause arising out of the particular circumstances.

In the instant case, the officers, prior to stopping the car, did not know this car, did not know the driver, did not know and had not observed the contents of the car, and had

[fol. 33] witnessed no breach of the law. Were the officers legally permitted to stop the car and search it solely upon an observation that the car was low in the rear? That this was the sole basis for their action is apparent, despite the statement of Officer Snyder "that he had reason to believe that a late model, black, four-door, Sedan, Plymouth, was delivering liquor illegally into Pennsylvania from a dealer in South Jersey", because on cross-examination this officer stated that the information was obtained from his own prior observations. The factual falsity of the latter statement is obvious because both officers admitted that they had not previously seen either this automobile or the driver thereof. Hence, they could not have derived information from prior observations, as this was the first time they had ever seen this automobile and this driver. Lacking factual information, the action of the officers was based solely on suspicion, and was unlawful. Brinegar v. United States, supra, and Henry v. United States, supra.

In the instant case, the action was by state officers and in a state proceeding, whereas in Henry v. United States, supra, the action was by federal officers in a federal proceeding. However, in the recent case of Mapp v. Ohio, 81 Sup. Cut. 1684 (decided June 19, 1961) the Supreme Court of the United States held that the exclusionary rule that evidence illegally obtained was not admissible, was applicable to the courts of all the states of the United States, as well as to the federal courts.

This opinion reversed a state court conviction (and overruled Wolf v. Colorado, 338 U.S. 25 (1949)) and applied the due process clause of the Fourth and Fourteenth Amendments of the Constitution to state prosecutions, as well as to federal prosecutions.

[fol. 34] It follows, therefore, that the Petition for Forfeiture of the automobile must be dismissed. The seizure was founded upon evidence illegally obtained, since under the particular circumstances the officers acted without probable cause.

Date: November 30, 1961.

By the court, McClanaghan, J.

[fol. 36] [File endorsement omitted]

[fol. 37]

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 58

No. 14 October Term, 1962

COMMONWEALTH OF PENNSYLVANIA, Appellant,

v.

ONE 1958 PLYMOUTH SEDAN, IN POSSESSION OF McGONIGLE.

Appeal of Pennsylvania Liquor Control Board from Order of Quarter Sessions Court of Philadelphia County, Misc. Liquor Condemnation Docket No. 4 of February Term, 1961.

OPINION BY ERVIN, J.—Filed November 15, 1962

On December 16, 1960 two enforcement officers of the Pennsylvania Liquor Control Board were stationed on the Admiral Wilson Boulevard in New Jersey, the approach to the Benjamin Franklin Bridge leading into Philadelphia, Pennsylvania. At 6:30 a.m. on the above date the officers saw a black Plymouth four-door sedan, bearing Pennsylvania registration plates, approaching the bridge. The car was quite low in the rear and the officers followed the car across the bridge into Philadelphia and on Vine Street, west of Sixth Street, in Philadelphia, the officers stopped the car, identified themselves and questioned the operator, George McGonigle. In the rear of the car and in the trunk the officers found 375 bottles (31 cases) of high priced whiskey and wine not bearing Pennsylvania tax seals. The operator of the car, McGonigle, stated to the officers that he had been hired to deliver this liquor from Margate to Philadelphia for $30.00, that he knew it was unlawful but took the chance. McGonigle made no objection to the search of the automobile. The car and liquor were seized and McGonigle was arrested. The officers had neither a search nor a body warrant. A petition for the forfeiture of the

car was filed in the court below and, after hearing, the petition was dismissed and it was directed that the car be returned to the owner. The court held that the seizure was founded upon evidence illegally obtained. The Commonwealth appealed.

The procedure for the forfeiture of this car is provided by §601 of the Liquor Code (as amended by the Act of [fol. 38] April 20, 1956), 47 PS §6-601, and in effect states: "No property rights shall exist in any liquor, alcohol or malt or brewed beverage illegally manufactured or possessed, or in any still, equipment, material, utensil, vehicle, boat, vessel, animals or aircraft used in the illegal manufacture or illegal transportation of liquor, alcohol or malt or brewed beverages, and the same shall be deemed contraband and proceedings for its forfeiture to the Commonwealth may, at the discretion of the board, be instituted in the manner hereinafter provided."

The owner of the automobile presented no evidence and there can be no question but that the automobile was being used to illegally transport untaxed liquor from New Jersey into Pennsylvania.

The Fourth Amendment to the United States Constitution prohibits only unreasonable searches and seizures.

We repeat what we said in *Com.* v. *One 1955 Buick Sedan*, 198 Pa. Superior Ct. 133, 137, 138, 182 A. 2d 280: "The leading case in this field is Carroll v. United States, 267 U.S. 132, 149, 69 L. ed. 543, wherein Chief Justice TAFT said: 'On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The 4th Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.'

". . . At p. 153 it was further said: 'We have made a somewhat extended reference to these statutes to show

that the guaranty of freedom from unreasonable searches and seizures by the 4th Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon, or automobile for [fol. 39] contraband goods, where it is not practicable to secure a warrant because the vehicle can be moved quickly out of the locality or jurisdiction in which the warrant must be sought.

"'Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made. It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary, because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.'

"It was further said, at pp. 155, 156: 'The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported.'"

In the case of *Henry v. United States*, 361 U.S. 98, 80 S. Ct. 168, a case greatly relied upon by the appellee, the Court, in the majority opinion, at page 104, said: "The fact that packages have been stolen does not make every man who carries a package subject to arrest nor the package subject to seizure. The police must have reasonable grounds

to believe that the particular package carried by the citizen is contraband. Its shape and design might at times be adequate. *The weight of it and the manner in which it is carried* [fol. 40] *might at times be enough.*" (Emphasis supplied)

We also add that the place where the search is made should be taken into consideration.

With these principles in mind, let us review the facts in the present case. Officer Snyder testified: "That I had reason to believe that a late model black four-door sedan, Plymouth, was delivering liquor illegally into Pennsylvania from a dealer in South Jersey." In cross-examination he stated that he got this information from previous observations, although he had admitted that he had never seen this car or the driver before. The "previous observations" were not explored any further. A further exploration might have revealed more information concerning the source of the officer's knowledge. This car attracted the officers' attention because it was quite low in the rear. When the officers first observed the car, it was about to enter the Delaware River Bridge leading from the State of New Jersey to the State of Pennsylvania. A state should have the right to stop a traveler coming into the state and to search his belongings to ascertain whether he is bringing into the state any property upon which a state tax is due. The Commonwealth of Pennsylvania has a sales tax, a liquor tax and a cigarette tax, and if its officers may not stop vehicles coming into the state to ascertain whether its laws are being violated, law enforcement will be greatly impeded.

Many times travelers are stopped at state borders and their cars are searched to ascertain whether diseased vegetation is being brought into the state. Nobody complains about this or feels that his privacy is being unduly invaded. Airplane passengers are many times required to open their luggage for inspection to ascertain whether bombs are being brought upon the plane. These are concomitants of a modern civilization and are accepted by most people without objection for their own protection and best interests. Also, the search was on December 16, which was at a time when [fol. 41] the officers might well believe illegal liquor would

be transported into Pennsylvania to meet the demands of the holiday trade. If the officers had left the scene to obtain a search warrant, the evidence would undoubtedly have been lost. The back rest of the rear seat had been removed so that the liquor could be stored in the back part of the car in addition to being stored in the rear trunk. Just what the officers could observe through the windows of the car when it was stopped was not brought out in the testimony. Undoubtedly they could have seen what was on the rear seat of the car without making any search. Whether they could tell from this point of view that the liquor did not bear Pennsylvania seals, we do not know. There can be no doubt that a misdemeanor (the transportation of untaxed liquor) was being committed in their presence. Under all of the circumstances, we are of the opinion that the search and seizure were reasonable. Mr. Justice Clark, in his dissenting opinion in the *Henry* case, said at page 106: "When an investigation proceeds to the point where an agent has reasonable grounds to believe that an offense is being committed in his presence, he is obligated to proceed to make such searches, seizures, and arrests as the circumstances require. It is only by such alertness that crime is discovered, interrupted, prevented, and punished. We should not place additional burdens on law enforcement agencies."

Order reversed and it is hereby ordered that the 1958 Plymouth sedan bearing Manufacturer's Serial No. LP1N3159 be and the same is hereby forfeited and condemned and it is ordered that the vehicle shall be delivered to the Pennsylvania Liquor Control Board for its use or sale or disposition by the board in its discretion, in accordance with the Act of 1951, April 12, P.L. 90, art. VI §603(c), as amended, 47 PS §6-603(c).

Montgomery, J., files a dissenting opinion.

Flood, J., files a dissenting opinion in which Watkins, J., joins.

[fol. 43]

DISSENTING OPINION BY MONTGOMERY, J.

Although the United States is rightfully proud of the various freedoms set forth in its Constitution, it also proudly boasts of another one not specifically mentioned. I refer to the freedom of travel from one state to another without visa or barrier.

As I read the opinion of the majority in this case, that freedom will exist no longer. If automobiles may be stopped at the state lines and searched for contraband without cause or reason, traveling here will be no different than going from country to country in other parts of the world.

I find no reasonable cause in the present case for stopping and searching the automobile of the appellee; nor do I interpret any of the evidence or the contention of the Commonwealth as indicating that the search was consensual. The lower court was of the same opinion.

Therefore, I respectfully dissent.

[fol. 45]

DISSENTING OPINION BY FLOOD, J.

I cannot agree that there was reasonable or probable cause for the search in this case. The mere fact that the car looked like another one of which the officers had some justifiable suspicions does not give ground for reasonable suspicion that this one was being used to break the law. Admittedly this was not the car which the officers were on the look-out for.

Beyond this the only ground for suspecting that the car was carrying contraband was that it was "quite low in the rear". I do not believe that the law sanctions the search of a car which appears to be low in the rear because this fact alone engenders suspicion in the minds of the enforcement officers that it might be carrying liquor illegally into the State. Taken with other circumstances, the low rear might give ground for reasonable suspicion. In *Patenotte* v. *United States*, 266 F. 2d 647 (1959), the court listed five facts to be considered in determining whether there is proper cause to stop and search a vehicle: (1) the reputa-

[fol. 46] tion of, or the informant's report concerning, the

occupants; (2) the reputation of the vehicle or its owners; (3) the condition of the vehicle (e.g. weighted down); (4) information from informers as to the illegal nature of the trip; and (5) the reputation of the place where the vehicle is found. No doubt this list is not exhaustive. However, we have seen no case where the third of the five facts listed was held sufficient of itself to justify a search and seizure.

If this had been the vehicle of which the officers entertained suspicions earlier and it was driven by persons or associates of persons, who, to their knowledge, had imported liquor into Pennsylvania illegally, there would have been enough, and the fact that the vehicle was weighted down would have added to the reasonableness of the search. However, the naked fact that the vehicle was weighted down merely means that there was a large amount of material or some heavy material in the trunk, or perhaps that there was something wrong with the springs. Of itself it does not furnish reasonable ground for a search and seizure.

[fol. 47] Nor can I accept the argument that the state should have a right to stop a traveler coming into the state and to search his belongings to ascertain whether he is bringing into the state any property upon which a state tax is due. This amounts to saying that the state has a right to establish custom houses, barriers or roadblocks at its border with other states. This takes us back to the Articles of Confederation or, worse, to the toll-gates of the villages of mediaeval Europe.

Searches at state borders for diseased vegetation or searches of airplane passengers' baggage to ascertain whether bombs are being brought on the plane furnish no analogy for the situation before us. Protection of life and health may furnish a necessity for a search which will be held reasonable under circumstances of relatively slight suspicion, where it would not be at all reasonable to search merely for the enforcement of the revenue laws of the state. The Fourth Amendment to the United States Constitution protects persons against "unreasonable searches and seizures". The courts naturally cannot define with precision and in detail what constitutes a reasonable search.

At best they can list factors such as was done in the *Patenotte* case, supra. And no doubt other factors might be important under varying circumstances. Certainly, among the things which must be taken into consideration in determining whether a search is reasonable is the necessity for immediate investigation. *Brinegar* v. *United States,* 338 U.S. 160 (1949). It was a necessity for immediate stopping and searching of the car in *Carroll* v. *United States,* 267 U.S. 132 (1925), cited in the majority opinion, which justified searching the car in that case without a warrant. There the circumstances furnished adequate grounds for suspecting that the car was carrying contraband. When [fol. 48] there is no such adequate ground for suspicion then something else of overriding importance must furnish the necessity for immediate investigation. As Mr. Justice Jackson said in his dissenting opinion in *Brinegar* v. *United States,* supra at pp. 180, 183: "If we assume for example, that a child is kidnapped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger." To sustain what amounts to a customs barrier to enable the Commonwealth to confiscate some liquor or collect the tax due upon it with no more ground of suspicion than exists here, is to my mind a clear violation of rights guaranteed by the Fourth and Fourteenth Amendments.

As Chief Justice Taft said in the *Carroll* case, supra at pp. 153-4: "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self

protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belong-[fol. 49] ings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

The prohibition against the importation of liquor into the Comonwealth, except in accordance with the regulations of the board, contained in §491(8) of the Liquor Control Act of April 12, 1951, P. L. 90, art. IV, 47 PS §4-491(8) is aimed at the protection of the State's revenues from the sale of liquor within its borders. If, however, it can be said to have for its purpose the reduction or regulation of the consumption of liquor, the result is the same. The provision of our Liquor Control Act forbidding importation of liquor into the State is authorized by §2 of the Twenty-first Amendment to the Constitution of the United States. But while the Commonwealth may legislate against the importation of untaxed liquor into Pennsylvania under the Twenty-first Amendment, which to that extent modifies the congressional power to regulate interstate commerce under art. I, §8 of the United States Constitution, yet I see nothing in that amendment which modifies in liquor cases the prohibition in the Fourth and Fourteenth Amendments against unreasonable searches or seizures. And under Chief Justice Taft's language in the *Carroll* case, supra, this search would not have been authorized even under the Eighteenth Amendment.

This case recalls the words of Mr. Justice Musmanno relating to a similar invasion of a citizen's right of privacy [fol. 50] —by wiretapping—in order to get evidence of another crime, carrying no threat to life and limb—gambling —in his dissenting opinion in *Commonwealth* v. *Chaitt*, 380 Pa. 532, at 549, 112 A. 2d 379, 388 (1955): "I would rather see a petty gambler go free than that the great people of this Commonwealth should be deprived of the personal liberties forged in the fires of Lexington and Gettysburg

and formulated amid the storm of debate in our legislative halls."

I would affirm the order of the court below suppressing this evidence.

Watkins, J. joins in this dissent.

[fol. 79] [File endorsement omitted]

[fol. 80]

IN THE SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

No. 204—January Term, 1963.

COMMONWEALTH OF PENNSYLVANIA

v.

ONE 1958 PLYMOUTH SEDAN, In Possession of McGonigle, Appellant

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Appeal from Judgment of the Superior Court of Pennsylvania, No. 14 October Term, 1962
Entered November 15, 1962

OPINION—FILED APRIL 21, 1964

Jones, J.

At approximately 6:30 a.m. on December 16, 1960, two officers of the Pennsylvania Liquor Control Board, stationed near the approach to the Benjamin Franklin bridge in New Jersey, observed a 1958 Plymouth sedan bearing Pennsylvania license plates proceeding toward the bridge in the direction of Philadelphia. Noting that "the car was low in the rear, quite low", the officers followed the automobile across the bridge into Philadelphia where they stopped and searched the automobile without first having obtained either a body or a search warrant. Their search

revealed that the rear seat and back-rest of the automobile had been removed and that the rear and trunk of the automobile contained 375 bottles of whiskey and wine none of which bore Pennsylvania tax seals.

[fol. 81] Both the car and alcoholic beverages were seized. The Commonwealth instituted proceedings for the forfeiture of the automobile in the Court of Quarter Sessions of Philadelphia County. That court dismissed the forfeiture proceedings on the ground that the seizure of the automobile "was founded upon evidence illegally obtained", i.e., without a warrant and without probable cause. The Superior Court reversed, three judges dissenting, and we granted an allocatur.

The thrust of the arguments, both of the appellant and the Commonwealth, is directed to the validity and propriety of the search and the subsequent seizure by the officers of this Plymouth automobile. In our view, such arguments are beyond the point. By reason of the nature of the present proceeding, i.e., a forfeiture procedure, we consider it unnecessary to determine the propriety and validity of the search and the seizure of this automobile.

This proceeding was instituted under the Act of April 12, 1951, P. L. 90, art. VI, § 601, as amended by the Act of April 20, 1956, P. L. (1955) 1508, § 1, 47 PS § 6-601, which provides: "No property rights shall exist in any . . . vehicle . . . used in the illegal transportation of liquor, alcohol or malt or brewed beverages, and the *same shall be deemed contraband* and proceedings for its forfeiture to the Commonwealth may, at the discretion of the board,[1]

[1] Prior to the 1956 amendment, the forfeiture of an automobile used in the illegal transportation of liquor was mandatory: *Commonwealth* v. *One 1939 Candillac Sedan, et al.*, 158 Pa. Superior Ct. 392, 45 A. 2d 406; *Commonwealth* v. *One Dodge Sedan*, 141 Pa. Superior Ct. 34, 14 A. 2d 600. The 1956 amendment deleted from Section 601 of the 1951 Act the phrase "shall be forfeited to the Commonwealth" and inserted, in lieu thereof, the phrase "and proceedings for its forfeiture to the Commonwealth may, at the discretion of the board, be instituted. . . ." It has been held that, as a result of this amendment, the Board has discretion to *institute* forfeiture proceedings and the courts have discretion as to whether forfeiture shall be decreed even though illegal use of the auto-

[fol. 82] be instituted in the manner hereinafter provided. No such property when in the custody of the law shall be seized or taken therefrom on any writ of replevin or like process." (Emphasis supplied.) This proceeding is not a criminal proceeding (*Commonwealth* v. *One 1927 Graham Truck*, 165 Pa. Superior Ct. 1, 67 A. 2d 655; *Commonwealth* v. *One 1939 Cadillac Sedan*, supra) but a civil proceeding in rem (*Commonwealth* v. *One Five-Passenger Overland Sedan*, 90 Pa. Superior Ct. 376) and is directed to the confiscation of the property itself on the theory that the property is the offender.

The statute, upon which this proceeding is based, mandates that no property rights shall exist in an automobile used in the illegal transportation of liquor and declares an automobile engaged in such use shall be deemed to be contraband. Articles of contraband are things and objects outlawed and subject to forfeiture and destruction upon seizure: 17 C. J. S. 510. "It is the use to which the property is put that renders property, otherwise lawful, rightful to have, use and possess, subject to seizure and forfeiture": *Hemenway & Moser Co., et al.* v. *Funk, et al.*; 100 Utah 72, 106 P. 2d 779. The purpose for which the thing or article is used acts as the criterion for the classification of such thing or article as contraband or non-contraband.

[fol. 83] The court below refused to decree a forfeiture in the instant case because, inferentially at least, it believed that the rule of exclusion of evidence illegally obtained applied to this proceeding, even though not a criminal proceeding. In this respect the court erred.

In *United States* v. *One Ford Coupe*, 272 U. S. 321, 47 S. Ct. 154, almost forty years ago the U. S. Supreme Court, speaking through Mr. Justice Brandeis, recognized that an illegal or unauthorized seizure of an automobile

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mobile has been established: *Commonwealth* v. *One 1957 Chevrolet Sedan, et al.*, 191 Pa. Superior Ct. 179, 155 A. 2d 438; *Commonwealth* v. *One 1958 Oldsmobile Sedan*, 194 Pa. Superior Ct. 352, 355, 356, 168 A. 2d 776; *Commonwealth* v. *One 1959 Chevrolet Impala Coupe*, 201 Pa. Superior Ct. 145, 191 A. 2d 717.

did not preclude the possibility of a forfeiture proceeding: "It is settled that where property declared by a federal statute to be forfeited because used in violation of federal laws is seized by one having no authority to do so, the United States may adopt the seizure with the same effect as if it had originally been made by one duly authorized." (272 U. S. at p. 325, 47 S. Ct. at p. 155.)[2]

Very recently, the U. S. Court of Appeals for the Third Circuit in *U. S.* v. *$1,058.00 in United States Currency*, 323 F. 2d 211, held that contraband, even though unlawfully seized, may nevertheless be forfeited. The Court stated: "The doctrine of One Ford Coupe [supra] has been applied by the circuits in Interbartolo v. United States, 303 F. 2d 34, 38 (1 Cir., 1962); United States v. Carey, 272 F. 2d 492, 494-495 (5 Cir., 1959); United States v. One 1956 Ford Tudor Sedan, 253 F. 2d 725, 726, 727 (4 Cir., 1958); United States v. Pacific Finance Corp., 110 F. 2d 732 (2 Cir., 1940); Bourke v. United States, 44 F. 2d 371 (6 Cir., 1930).

[fol. 84] "In United States v. Jeffers, 342 U. S. 48, 72 S. Ct. 93, 96 L. Ed. 59 (1951), and Trupiano v. United States, 334 U. S. 699, 68 S. Ct. 1229, 92 L. Ed. 1663 (1948), where it was held that property illegally seized could not be used as evidence in a criminal proceeding, it was noted that such property could nevertheless be forfeited.

"It was said in Jeffers, 342 U. S. at page 54, 72 S. Ct. at page 96, 96 L. Ed. 59:

> "'*Since the evidence illegally seized was contraband the respondent was not entitled to have it returned to him.* It being his property, for the purposes of the exclusionary rule, he was entitled on motion to have it suppressed as evidence on his trial.' (emphasis supplied)

and in Trupiano, 334 U. S. at page 710, 68 S. Ct. at pages 1234-1235, 92 L. Ed. 1663:

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[2] In *Dodge et al.* v. *U. S.*, 272 U. S. 530, 532, 47 S. Ct. 191, 192, the Court, speaking through Mr. Justice Holmes, recognized the same rule.

"'It follows that it was error to refuse petitioners' motion to exclude and suppress the property which was improperly seized. *But since this property was contraband, they have no right to have it returned to them.*' (emphasis supplied)

"The sum of Jeffers and Trupiano is that the body of law relating to unlawful searches, arrests and seizures in criminal proceedings is without impact in a libel for forfeiture action which is an *in rem* proceeding.

"As was succinctly stated in Grogan v. United States, 261 F. 2d 86, at page 87 (5 Cir., 1958), cert. den. 359 U. S. 944, 79 S. Ct. 725, 3 L. Ed. 2d 677:

[fol. 85] "'The seizure of property, the title to which has been forfeited by the United States, is to be distinguished from the exclusion of evidence secured through an unlawful search and seizure. In the one case the Government is entitled to the possession of the property, in the other it is not.'"

In *U. S.* v. *Carey*, 272 F. 2d 492, 494, 495, where federal agents had noted that an automobile "was sagging in the rear and appeared to be heavily loaded" and had stopped the automobile finding a bottle of moonshine whiskey and 52 gallons of nontaxpaid whiskey in the car, the United States instituted forfeiture proceedings. Therein the Court stated: "There is a proper distinction between obtaining evidence for a criminal prosecution and a seizure of forfeited property under Internal Revenue laws" (p. 493) and that "[e]ven if it were assumed that the search and seizure were illegal, that would not defeat the Government's action for forfeiture." (p. 494). In *U. S.* v. *One 1956 Ford Tudor Sedan*, 253 F. 2d 725, 727, the Court said: "Legal infirmities in the seizure do not impair the right of the United States to condemn or clothe the former owner with property and possessory rights he lost when he used the property in violation of the revenue laws. Considerations which, in criminal cases, require the suppression of evidence obtained in an unlawful search or seizure have no application here. . . . We deem it un-

necessary to extend, beyond the suppression of evidence in the criminal jurisdiction, the overlordship of the conduct of federal law enforcement officers."[3] See also: *Martin et al.* v. *U. S.*, 277 F. 2d 785, 786.

[fol. 86] In this Commonwealth our courts have held that an unlawful seizure of contraband will not bar its forfeiture. In *Commonwealth* v. *Scanlon*, 84 Pa. Superior Ct. 569, 571, 572, Judge (later President Judge) Keller stated: "If intoxicating liquor, unlawfully possessed, is found on a man's premises and comes into possession of the Commonwealth, the law of this State does not require it to be returned to his criminal possession even though custody of it was obtained by an illegal search [citing cases]. . . . This is on the principle that, if the possession is unlawful, the liquor is forfeited to the Commonwealth, and no property right can exist in favor of an individual to such forfeited or contraband property." See also: *Commonwealth* v. *Davis*, 163 Pa. Superior Ct. 224, 60 A. 2d 552; *Commonwealth* v. *Hunsinger*, 89 Pa. Superior Ct. 238, 242; *Commonwealth* v. *One Box Benedictine, etc.*, 89 Pa. Superior Ct. 467, aff'd 290 Pa. 121.

The legislature has seen fit to declare the non-existence of property rights in any automobile used in the illegal transportation of liquor and that such an automobile is contraband. Under the decisional law of both federal and state courts, supra, we are satisfied that, even if the instant automobile had been illegally seized, such fact would not preclude the instant civil proceeding of forfeiture.[4]

Judgment affirmed.

Mr. Justice Musmanno dissents.

Mr. Justice Roberts files a concurring opinion.

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[3] We are not unaware of the observation of Mr. Justice Goldberg, concurring in *Cleary* v. *Bolger*, 371 U. S. 392, 83 S. Ct. 385 (1963), that the effect of the Fourth Amendment in civil cases in the federal courts is not "totally settled" and of the observation of Mr. Justice Brennan, dissenting in *Cleary*, that "it has not yet been settled whether Mapp [Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081] applies to administrative proceedings."

[4] We do not, nor need we, for the reasons set forth in this opinion, pass upon the validity of the seizure of this automobile. The validity of such seizure is of no moment in this proceeding.

[fol. 88]

CONCURRING OPINION—Filed April 21, 1964

ROBERTS, J.

I concur fully with the opinion of the Court. However, I wish to add the following comment concerning the Liquor Code and its application to this case.

Section 602 of the Liquor Code, April 12, 1951, P.L. 90, 47 P.S. § 6-602, provides:

> "(b) A copy of said petition [for forfeiture] shall be served personally on said owner if he can be found within the jurisdiction of the court, or upon the person or persons in possession at the time of the seizure thereof. Said copy shall have endorsed thereon a notice as follows:
>
> "'To the Claimant of Within Described Property: You *are required to file an answer* to this petition setting forth your title in and right to possession of said property, within fifteen (15) days from the service hereof; and you are also notified that *if you fail to file said answer, a decree of forfeiture and condemnation will be entered against said property.*'" (Emphasis supplied.)
>
> [fol. 89] "(d) Upon the filing of any claim for said property, setting forth a right to possession thereof, the case shall be deemed at issue and a time fixed for the hearing thereof."

Here, the uncontradicted fact is that the petition for forfeiture contained the notice to claimant in the precise statutory language and that no answer or claim was filed as required by the Code. Upon the failure to file an answer, all that the Code mandates is that a forfeiture decree in rem be entered.[1] Moreover, absent the filing of a claim under

[1] It should be noted that, as the trial court observed, "in a companion petition, the Commonwealth sought forfeiture of the liquor and wine, which was confiscated. The petition was not opposed, and forfeiture was ordered." No appeal was taken from that order.

subsection (d), there was no issue to be considered by the court below.[2]

The facts are undisputed, particularly the fact that the car was used in the illegal transportation of untaxed liquor, which may be deemed admitted on this record. In the absence of an answer to the petition or the filing of a claim of ownership pursuant to the Code, there remains only the entry of a final order of forfeiture as mandated by the Code.

[fol. 90] Petition for Rehearing covering 5 pages filed April 30, 1964 omitted from this print.

It was denied, and nothing more by order. June 30, 1964.

[fol. 103] Double Certificate to foregoing transcript (omitted in printing).

[fol. 105]

IN THE SUPREME COURT OF PENNSYLVANIA
January Term, 1963

ORDER DENYING PETITION FOR REARGUMENT—June 30, 1964
Petition denied.

Per Curiam.

[fol. 106]

SUPREME COURT OF THE UNITED STATES

No. 294—October Term, 1964

One 1958 Plymouth Sedan, Petitioner,

v.

PENNSYLVANIA

ORDER ALLOWING CERTIORARI—December 7, 1964

The petition herein for a writ of certiorari to the Supreme Court of the Commonwealth of Pennsylvania, Eastern District, is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

October Term, 1964.

No. 294

ONE 1956 PLYMOUTH SEDAN,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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Supreme Court of the United States.

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v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania, entered in the above entitled case on April 21, 1964.

CITATION TO OPINIONS BELOW.

The opinion of the Court of Quarter Sessions of Philadelphia County (R. 20a) [1] is unreported. The majority and dissenting opinions of the Superior Court of Pennsylvania (29a; 35a; 36a) are reported in 199 Pa. Superior Ct. 428, 186 A. 2d 52. The majority and concurring opinions of the Supreme Court of Pennsylvania (App. 2a, 8a) [2] are as yet unreported.

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was entered on April 21, 1964 (App. 1a). A timely petition for reargument was denied on June 30, 1964 (App. 9a). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257(3).

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1. "R." references are to the Record printed for the Supreme Court of Pennsylvania, nine copies of which have been filed with this Petition.

2. "App." references are to the Appendix to this Petition.

QUESTIONS PRESENTED.

1. Is evidence which has been obtained by an unreasonable search and seizure and thus must be excluded in a criminal case likewise to be excluded in a proceeding by a state to forfeit an automobile allegedly used in the transportation of untaxed liquor?

2. Are agents of a state permitted to stop and search automobiles and travelers at state borders, without a warrant and without probable cause, to ascertain whether such travelers are bringing property into the state upon which a state tax is due?

3. May state officers, acting without a search or body warrant, stop and search an automobile solely on the ground that the automobile is riding low in the rear?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

The Pennsylvania Liquor Code provides in pertinent part:

"§ 2-209. Officers and investigators of the board to be peace officers; powers

. . . [O]fficers and investigators shall have power and authority, upon reasonable and probable cause, to search for and to seize without warrant or process, except in private homes, any liquor . . . unlawfully . . . imported or transported and any . . . vehicles . . . which are or have been used in the unlawful . . . importation or transportation of the same. Such liquor . . . or . . . vehicles . . . so seized shall be disposed of as hereinafter provided." 1951, April 12, P. L. 90, art. II, § 209, PA. STAT. ANN. tit. 47, § 2-209.

"§ 6-601. Forfeiture of property illegally possessed or used

No property rights shall exist in any liquor . . . illegally manufactured or possessed, or in any . . . vehicle . . . used in the illegal manufacture or illegal transportation of liquor . . . and the same shall be deemed contraband and proceedings for its forfeiture to the Commonwealth may, at the discretion of the board, be instituted. . . . No such property when in the custody of the law shall be seized or taken therefrom on any writ of replevin or like process." 1951, April 12, P. L. 90, art. VI, § 601, as amended, 1956, April 20, P. L. (1955) 1508, § 1, PA. STAT. ANN. tit. 47, § 6-601 (Supp.).

STATEMENT OF THE CASE.

On January 23, 1961, the Commonwealth of Pennsylvania filed a petition in the Court of Quarter Sessions of Philadelphia County alleging that it had seized a 1958 Plymouth sedan automobile in the possession of George McGonigle and that the automobile had been used in violations of the Pennsylvania Liquor Code. The petition prayed that the court adjudge the automobile forfeited to the Commonwealth of Pennsylvania (R. 2a). A hearing was held on July 18, 1961, which was directed to the circumstances under which the automobile was stopped and searched. The testimony revealed that two enforcement officers of the Pennsylvania Liquor Control Board, who had no search or body warrant (R. 8a), followed the automobile across the bridge from Camden, New Jersey, to Philadelphia, Pennsylvania, and halted it a short distance within Philadelphia (R. 6a). A search into the rear and trunk of the automobile turned up 375 bottles of known brand liquor which did not contain Pennsylvania tax seals (R. 6a, 7a). Neither officer had seen this automobile or McGonigle prior to this occasion (R. 8a, 10a). Officer Reitman testified that his only reason for following and stopping the automobile was that it was quite low in the rear and that all he acted on was a suspicion (R. 8a). Officer Snyder testified that his testimony was the same as Reitman's (R. 9a-10a), with the addition that he had reason to believe that a late model, black, four-door sedan Plymouth was delivering liquor illegally into Pennsylvania from South Jersey (R. 10a). However, the trial judge, observing that there was no testimony that the automobile in question was a four-door, black, Plymouth sedan, rejected Snyder's additional testimony as a basis for probable cause (R. 23a, 27a).

At the conclusion of the hearing an oral application was made to dismiss the petition on the basis that the

Commonwealth's evidence was obtained as a result of an unreasonable search and seizure prohibited by the Fourth and Fourteenth Amendments (R. 13a). Specifically, it was contended that the officers of the Liquor Control Board, who had no search or body warrant, did not have probable cause to stop the automobile in which they found the liquor (R. 11a-14a). The trial judge made a specific finding of fact that the officers' sole basis for stopping the automobile was that it was low in the rear (R. 26a-27a). He concluded that the seizure was illegal and that the evidence flowing therefrom should have been excluded under *Mapp v. Ohio*, 367 U. S. 643 (R. 27a-28a). Accordingly, the Petition for Forfeiture was dismissed (R. 19a).

The Commonwealth appealed to the Superior Court of Pennsylvania which, by a 4-3 decision, reversed the order dismissing the petition. The Superior Court made no specific determination that the officers had probable cause to stop the automobile and search therein, but rather based its decision on the following principle:

> "A state should have the right to stop a traveler coming into the state and to search his belongings to ascertain whether he is bringing into the state any property upon which a state tax is due. The Commonwealth of Pennsylvania has a sales tax, a liquor tax and a cigarette tax, and if its officers may not stop vehicles coming into the state to ascertain whether its laws are being violated, law enforcement will be greatly impeded." (R. 32a)

The two dissenting opinions asserted that the Constitution of the United States does not permit travelers to be indiscriminately stopped at state borders without cause or reason (R. 35a, 37a-39a).

Your petitioner thereupon applied to the Supreme Court of Pennsylvania to allow an appeal from the judgment of the Superior Court (R. 41a). The petition specifi-

cally raised the Fourth Amendment question of the reasonableness of the search and seizure and also the question of whether the Superior Court's disposition of the case denied liberty of travel without due process of law (R. 52a). The Supreme Court allowed the appeal (R. 53a) and permitted the Superior Court judgment to stand (App. 1a). In affirming, the Supreme Court held that it need not reach the question of the validity of the search and seizure since, in its opinion, the federal constitutional guarantees relating to unlawful searches, arrests and seizures in criminal proceedings were not applicable in a forfeiture proceeding (App. 2a, 4a). One Justice wrote a concurring opinion dealing with certain procedural aspects of forfeiture proceedings (App. 8a) and Justice Musmanno dissented without opinion (App. 7a). A timely petition for reargument was denied (App. 9a).

REASONS FOR GRANTING THE WRIT.

1. The decision of the Pennsylvania Supreme Court that illegally obtained evidence is admissible in a forfeiture proceeding is based substantially upon the authority of the Third Circuit Court of Appeals in *United States v. $1,058.00 in United States Currency*, 323 F. 2d 211 (3rd Cir. 1963). The latter decision is in direct conflict with the recent Seventh Circuit Court of Appeals' decision in *United States v. $5,608.30 in United States Coin and Currency*, 326 F. 2d 359 (7th Cir. 1964). The Third Circuit said in *$1,058.00:*

> "The sum of Jeffers and Trupiano is that the body of law relating to unlawful searches, arrests and seizures in criminal proceedings is without impact in a libel for forfeiture action which is an *in rem* proceeding." 323 F. 2d at 213.

The Seventh Circuit said in *$5,608.30:*

> "We hold that in view of the broad language of the Fourth Amendment coupled with the quasi-criminal nature of the forfeiture proceeding, the District Court should have considered and ruled upon the motion to suppress in this forfeiture proceeding." 326 F. 2d at 362.

The conflict amongst the federal circuits on the question which your petitioner raises was specifically noted in *United States v. One 1963 Cadillac Hardtop*, 220 F. Supp. 841 (E. D. Wisc. 1963), wherein the Court stated:

> "The issue presently before the court is whether a motion to suppress evidence is proper in a civil libel proceeding. There is a definite conflict in the decisions of the various Circuit Courts of Appeal." 220 F. Supp. at 842.

Besides the conflict between the Third and Seventh Circuits, further confusion is cast on the question by the decisions of the Fourth, Fifth and Sixth Circuits on the one hand, and the First, Second and Tenth Circuits on the other hand. Thus, the Fourth Circuit said in *United States v. One 1956 Ford Tudor Sedan*, 253 F. 2d 725, 727 (4th Cir. 1958):

> "Considerations which, in criminal cases, require the suppression of evidence obtained in an unlawful search and seizure have no application here [in a forfeiture proceeding] . . . . We deem it unnecessary to extend, beyond the suppression of evidence in the criminal jurisdiction, the overlordship of the conduct of federal law enforcement officers",

whereas the Tenth Circuit held in *United States v. Butler*, 156 F. 2d 897, 899 (10th Cir. 1946):

> "The evidence obtained in connection with the unlawful search and seizure excluded, there was no proof on which to predicate a conviction in the criminal case or a forfeiture in the action for libel."

The Fifth Circuit noted in *United States v. Carey*, 272 F. 2d 492, 494-495 (5th Cir. 1959):

> "This Court has held on various occasions that the illegality of a search and seizure does not affect libel of information for forfeiture",

whereas the Second Circuit held in *United States v. Physic*, 175 F. 2d 338, 339 (2nd Cir. 1949):

> "Accordingly, the judgment cannot stand since, except for the fruit of the [illegal] search, the record is lacking in any evidence to support the forfeiture."

The Sixth Circuit's decision in *Bourke v. United States*, 44 F. 2d 371 (6th Cir. 1930), is considered to be in line with

the philosophy of the Third, Fourth and Fifth Circuits (see *e.g., United States v. $1,058.00 in United States Currency*, 323 F. 2d 211, 213), whereas the First Circuit in *Rogers v. United States*, 97 F. 2d 691, 692 (1st Cir. 1938), a civil suit by the government to collect customs duties on smuggled property, held:

> "[W]e think that a judgment in a civil cause, in the procurement of which evidence thus illegally obtained is used, is . . . rendered invalid."

Significantly, Mr. Justice Goldberg, concurring in *Cleary v. Bolger*, 371 U. S. 392, 403 (1963), noted that the effect of the Fourth Amendment in civil cases in the federal courts is not totally settled, citing *Rogers v. United States, supra, United States v. Butler, supra, United States v. Physic, supra* and *United States v. One 1956 Ford Tudor Sedan, supra.* That issue is now specifically raised by the instant record. Even though this case comes from the Supreme Court of Pennsylvania, the federal circuit conflict should now be settled because, under *Ker v. California*, 374 U. S. 23, the state courts must look to federal law in handling the application of the Fourth Amendment through the Fourteenth Amendment.

2. The decision of the court below, as well as those Circuit Court decisions holding that the Fourth Amendment has no bearing in forfeiture proceedings, is believed to be erroneous because of misplaced reliance on Your Honorable Court's decisions in *United States v. One Ford Coupe*, 272 U. S. 321, and *Dodge v. United States*, 272 U. S. 530. Both *One Ford, supra,* and *Dodge, supra,* dealt with the validity of seizures made by officers who had no statutory authority to do so. In *One Ford,* the validity of a seizure was not impaired although made by the prohibition director rather than an internal revenue officer. In *Dodge,* the validity of a seizure was not impaired although made by a police officer of the City of Providence, Rhode Island,

rather than the officers designated in section 26 of the National Prohibition Act. Neither *One Ford* nor *Dodge* was concerned with the use of evidence, seized illegally by Fourth Amendment standards, to prove that property is subject to forfeiture.

Moreover, the decision below and the other decisions questioned conflict with Your Honorable Court's decision in *Boyd v. United States,* 116 U. S. 616, a forfeiture proceeding wherein it is stated:

> "As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all purposes of the Fourth Amendment of the Constitution. . . ."

3. The effect of the judgment of the Pennsylvania Supreme Court, affirming the judgment of the Pennsylvania Superior Court, is to establish a principle that a traveler may be arbitrarily stopped at a state border, without cause or reason to do so, and that he and his automobile may be searched to ascertain if he is bringing taxable property into the state. This is in direct conflict with Your Honorable Court's decision in *Carroll v. United States,* 267 U. S. 132. In determining under what circumstances an automobile may be stopped and searched without a warrant, Mr. Chief Justice Taft said:

> "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highway to the inconvenience and indignity of such a search . . . . [T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official,

authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." 267 U. S. at 153-154.

4. The issues presented by this petition are of extreme public importance. Provisions for forfeiture of property used to violate federal and state revenue laws are common, and the question of the Fourth and Fourteenth Amendments' applicability will undoubtedly arise in future forfeiture cases. Moreover, under the law of the instant case, thousands of travelers entering Pennsylvania are subject to state border searches reminiscent of the toll gates of the villages of medieval Europe. Travelers who enter Pennsylvania are being treated as if they were going from country to country in other parts of the world.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Court should grant a writ of certiorari to settle the important question of whether the citizens of this country are entitled to the protections of the Fourth and Fourteenth Amendments when the government attempts to confiscate their private property. The writ should also be granted to restrain the Commonwealth of Pennsylvania's asserted right to make border searches without probable cause to believe that the law is or has been violated.

Respectfully submitted,

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LOUIS LIPSCHITZ,
JEROLD G. KLEVIT,
Attorneys for Petitioner.

Appendix.

JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA.

COMMONWEALTH OF PENNSYLVANIA

v.

ONE 1958 PLYMOUTH SEDAN, IN POSSESSION OF MCGONIGLE,

Appellant.

Appeal From Judgment of the Superior Court of Pennsylvania, No. 14, October Term, 1962.

Argued: January 17, 1964

JUDGMENT AFFIRMED.

JONES, *J.*

Filed: 4-21-64

Mr. Justice Roberts filed a concurring opinion.

Mr. Justice Musmanno dissents.

OPINION OF THE SUPREME COURT OF PENNSYLVANIA.

Filed: April 21, 1964.

JONES, *J.*

At approximately 6:30 A. M. on December 16, 1960, two officers of the Pennsylvania Liquor Control Board, stationed near the approach to the Benjamin Franklin bridge in New Jersey, observed a 1958 Plymouth sedan bearing Pennsylvania license plates proceeding toward the bridge in the direction of Philadelphia. Noting that "the car was low in the rear, quite low", the officers followed the automobile across the bridge into Philadelphia where they stopped and searched the automobile without first having obtained either a body or a search warrant. Their search revealed that the rear seat and the back-rest of the automobile had been removed and that the rear and trunk of the automobile contained 375 bottles of whiskey and wine none of which bore Pennsylvania tax seals.

Both the car and alcoholic beverages were seized. The Commonwealth instituted proceedings for the forfeiture of the automobile in the Court of Quarter Sessions of Philadelphia County. That court dismissed the forfeiture proceedings on the ground that the seizure of the automobile "was founded upon evidence illegally obtained", i.e., without a warrant and without probable cause. The Superior Court reversed, three judges dissenting, and we granted an allocatur.

The thrust of the arguments, both of the appellant and the Commonwealth, is directed to the validity and propriety of the search and the subsequent seizure by the officers of this Plymouth automobile. In our view, such arguments are beyond the point. By reason of the nature of the present proceeding, i.e., a forfeiture procedure, we consider it unnecessary to determine the propriety and validity of the search and the seizure of this automobile.

This proceeding was instituted under the Act of April 12, 1951, P. L. 90, art. VI, § 601, as amended by the Act of April 20, 1956, P. L. (1955) 1508, § 1, 47 P. S. § 6-601, which provides: "No property rights shall exist in any . . . vehicle . . . used in the illegal transportation of liquor, alcohol or malt or brewed beverages, and the *same shall be deemed contraband* and proceedings for its forfeiture to the Commonwealth may, at the discretion of the board,[1] be instituted in the manner hereinafter provided. No such property when in the custody of the law shall be seized or taken therefrom on any writ of replevin or like process." (Emphasis supplied.) This proceeding is not a criminal proceeding (*Commonwealth v. One 1927 Graham Truck*, 165 Pa. Superior Ct. 1, 67 A. 2d 655; *Commonwealth v. One 1939 Cadillac Sedan*, supra) but a civil proceeding in rem (*Commonwealth v. One Five-Passenger Overland Sedan*, 90 Pa. Superior Ct. 376) and is directed to the confiscation of the property itself on the theory that the property is the offender.

The statute, upon which this proceeding is based, mandates that no property rights shall exist in an automobile used in the illegal transportation of liquor and declares an automobile engaged in such use shall be deemed to be con-

1. Prior to the 1956 amendment, the forfeiture of an automobile used in the illegal transportation of liquor was mandatory: *Commonwealth v. One 1939 Cadillac Sedan, et al.*, 158 Pa. Superior Ct. 392, 45 A. 2d 406; *Commonwealth v. One Dodge Sedan*, 141 Pa. Superior Ct. 34, 14 A. 2d 600. The 1956 amendment deleted from Section 601 of the 1951 Act the phrase "shall be forfeited to the Commonwealth" and inserted, in lieu thereof, the phrase "and proceedings for its forfeiture to the Commonwealth may, at the discretion of the board, be instituted. . . ." It has been held that, as a result of this amendment, the Board has discretion to *institute* forfeiture proceedings and the courts have discretion as to whether forfeiture shall be decreed even though illegal use of the automobile has been established: *Commonwealth v. One 1957 Chevrolet Sedan, et al.*, 191 Pa. Superior Ct. 179, 155 A. 2d 438; *Commonwealth v. One 1958 Oldsmobile Sedan*, 194 Pa. Superior Ct. 352, 355, 356, 168 A. 2d 776; *Commonwealth v. One 1959 Chevrolet Impala Coupe*, 201 Pa. Superior Ct. 145, 191 A. 2d 717.

traband. Articles of contraband are things and objects outlawed and subject to forfeiture and destruction upon seizure: 17 C. J. S. 510. "It is the use to which the property is put that renders property, otherwise lawful, rightful to have, use and possess, subject to seizure and forfeiture": *Hemenway & Moser Co. et al., v. Funk, et al.*, 100 Utah 72, 106 P. 2d 779. The purpose for which the thing or article is used acts as the criterion for the classification of such thing or article as contraband or non-contraband.

The court below refused to decree a forfeiture in the instant case because, inferentially at least, it believed that the rule of exclusion of evidence illegally obtained applied to this proceeding, even though not a criminal proceeding. In this respect the court erred.

In *United States v. One Ford Coupe*, 272 U. S. 321, 47 S. Ct. 154, almost forty years ago the U. S. Supreme Court, speaking through Mr. Justice Brandeis, recognized that an illegal or unauthorized seizure of an automobile did not preclude the possibility of a forfeiture proceeding: "It is settled that where property declared by a federal statute to be forfeited because used in violation of federal laws is seized by one having no authority to do so, the United States may adopt the seizure with the same effect as if it had originally been made by one duly authorized." (272 U. S. at p. 325, 47 S. Ct. at p. 155).[2]

Very recently, the U. S. Court of Appeals for the Third Circuit in *U. S. v. $1,058.00 in United States Currency*, 323 F. 2d 211, held that contraband, even though unlawfully seized, may nevertheless be forfeited. The Court stated: "The doctrine of One Ford Coupe [supra] has been applied by the circuits in Interbartolo v. United States, 303 F. 2d 34, 38 (1 Cir., 1962); United States v. Carey, 272 F. 2d 492, 494-495, (5 Cir., 1959); United States v. One 1956 Ford Tudor Sedan, 253 F. 2d 725, 726, 727 (4 Cir., 1958); United

2. In *Dodge et al. v. U. S.*, 272 U. S. 530, 532, 47 S. Ct. 191, 192, the Court, speaking through Mr. Justice Holmes, recognized the same rule.

States v. Pacific Finance Corp., 110 F. 2d 732 (2 Cir., 1940); Bourke v. United States, 44 F. 2d 371 (6 Cir., 1930).

"In United States v. Jeffers, 342 U. S. 48, 72 S. Ct. 93, 96 L. Ed. 59 (1951), and Trupiano v. United States, 334 U. S. 699, 68 S. Ct. 1229, 92 L. Ed. 1663 (1948), where it was held that property illegally seized could not be used as evidence in a criminal proceeding, it was noted that such property could nevertheless be forfeited.

"It was said in Jeffers, 342 U. S. at page 54, 72 S. Ct. at page 96, 96 L. Ed. 59:

> " '*Since the evidence illegally seized was contraband the respondent was not entitled to have it returned to him.* It being his property, for the purposes of the exclusionary rule, he was entitled on motion to have it suppressed as evidence on his trial.' (Emphasis supplied.)

and in Trupiano, 334 U. S. at page 710, 68 S. Ct. at pages 1234-1235, 92 L. Ed. 1663:

> " 'It follows that it was error to refuse petitioners' motion to exclude and suppress the property which was improperly seized. *But since this property was contraband, they have no right to have it returned to them.*' (Emphasis supplied.)

"The sum of Jeffers and Trupiano is that the body of law relating to unlawful searches, arrests and seizures in criminal proceedings is without impact in a libel for forfeiture action which is an *in rem* proceeding.

"As was succinctly stated in Grogan v. United States, 261 F. 2d 86, at page 87 (5 Cir., 1958), cert. den. 359 U. S. 944, 79 S. Ct. 725, 3 L. Ed. 2d 677:

> " 'The seizure of property, the title to which has been forfeited by the United States, is to be distinguished from the exclusion of evidence secured through an un-

lawful search and seizure. In the one case the Government is entitled to the possession of the property, in the other it is not.' "[3]

In *U. S. v. Carey*, 272 F. 2d 492, 494, 495, where federal agents had noted that an automobile "was sagging in the rear and appeared to be heavily loaded" and had stopped the automobile finding a bottle of moonshine whiskey and 52 gallons of nontaxpaid whiskey in the car, the United States instituted forfeiture proceedings. Therein the Court stated: "There is a proper distinction between obtaining evidence for a criminal prosecution and a seizure of forfeited property under Internal Revenue laws" (p. 493) and that "[e]ven if it were assumed that the search and seizure were illegal, that would not defeat the Government's action for forfeiture." (p. 494). In *U. S. v. One 1956 Ford Tudor Sedan*, 253 F. 2d 725, 727, the Court said: "Legal infirmities in the seizure do not impair the right of the United States to condemn or clothe the former owner with property and possessory rights he lost when he used the property in violation of the revenue laws. Considerations which, in criminal cases, require the suppression of evidence obtained in an unlawful search or seizure have no application here. . . . We deem it unnecessary to extend, beyond the suppression of evidence in the criminal jurisdiction, the overlordship of the conduct of federal law enforcement officers."[3] See also: *Martin et al. v. U. S.*, 277 F. 2d 785, 786.

In this Commonwealth our courts have held that an unlawful seizure of contraband will not bar its forfeiture. In *Commonwealth v. Scanlon*, 84 Pa. Superior Ct. 569, 571,

3. We are not unaware of the observation of Mr. Justice Goldberg, concurring in *Cleary v. Bolger*, 371 U. S. 392, 83 S. Ct. 385 (1963), that the effect of the Fourth Amendment in civil cases in the federal courts is not "totally settled" and of the observation of Mr. Justice Brennan, dissenting in *Cleary*, that "is has not yet been settled whether Mapp [Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081] applies to administrative proceedings."

572, Judge (later President Judge) Keller stated: "If intoxicating liquor, unlawfully possessed, is found on a man's premises and comes into possession of the Commonwealth, the law of this State does not require it to be returned to his criminal possession even though custody of it was obtained by an illegal search [citing cases]. . . . This is on the principle that, if the possession is unlawful, the liquor is forfeited to the Commonwealth, and no property right can exist in favor of an individual to such forfeited or contraband property." See also: *Commonwealth v. Davis*, 163 Pa. Superior Ct. 224, 60 A. 2d 552; *Commonwealth v. Hunsinger*, 89 Pa. Superior Ct. 238, 242; *Commonwealth v. One Box Benedictine, etc.*, 89 Pa. Superior Ct. 467, aff'd 290 Pa. 121.

The legislature has seen fit to declare the non-existence of property rights in any automobile used in the illegal transportation of liquor and that such an automobile is contraband. Under the decisional law of both federal and state courts, supra, we are satisfied that, even if the instant automobile had been illegally seized, such fact would not preclude the instant civil proceeding of forfeiture.[4]

Judgment affirmed.

Mr. Justice Musmanno dissents.

Mr. Justice Roberts files a concurring opinion.

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4. We do not, nor need we, for the reasons set forth in this opinion, pass upon the validity of the seizure of this automobile. The validity of such seizure is of no moment in this proceeding.

CONCURRING OPINION BY ROBERTS, J.

ROBERTS, *J.* Filed: April 21, 1964

I concur fully with the opinion of the Court. However, I wish to add the following comment concerning the Liquor Code and its application to this case.

Section 602 of the Liquor Code, April 12, 1951, P. L. 90, 47 P. S. § 6-602, provides:

"(b) A copy of said petition [for forfeiture] shall be served personally on said owner if he can be found within the jurisdiction of the court, or upon the person or persons in possession at the time of the seizure thereof. Said copy shall have endorsed thereon a notice as follows:

" 'To the Claimant of Within Described Property: You *are required to file an answer* to this petition setting forth your title in and right to possession of said property, within fifteen (15) days from the service hereof; and you are also notified that *if you fail to file said answer, a decree of forfeiture and condemnation will be entered against said property.*' " (Emphasis supplied.)

"(d) Upon the filing of any claim for said property, setting forth a right to possession thereof, the case shall be deemed at issue and a time fixed for the hearing thereof."

Here, the uncontradicted fact is that the petition for forfeiture contained the notice to claimant in the precise statutory language and that no answer or claim was filed as required by the Code. Upon the failure to file an answer, all that the Code mandates is that a forfeiture decree

in rem be entered.[1] Moreover, absent the filing of a claim under subsection (d), there was no issue to be considered by the court below.[2]

The facts are undisputed, particularly the fact that the car was used in the illegal transportation of untaxed liquor, which may be deemed admitted on this record. In the absence of an answer to the petition or the filing of a claim of ownership pursuant to the Code, there remains only the entry of a final order of forfeiture as mandated by the Code.

ORDER SUR PETITION FOR REARGUMENT.

June 30, 1964

Petition denied.

PER CURIAM.

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1. It should be noted that, as the trial court observed, "in a companion petition, the Commonwealth sought forfeiture of the liquor and wine, which was confiscated. The petition was not opposed, and forfeiture was ordered.". No appeal was taken from that order.

2. Thus, it is suggested that the hearing below was unnecessary and contrary to the provisions of the Code.

In The Supreme Court of the United States

October Term, 1964
No. 294

ONE 1958 PLYMOUTH SEDAN,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

ANSWER TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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TABLE OF CASES

COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Do the rules of evidence pertaining to the validity and propriety of search in criminal prosecutions also apply to proceedings for the forfeiture of contraband?

2. Is a claimant to property which is contraband under the law entitled to have the contraband returned to him because the contraband was illegally seized by state officers?

3. Where Pennsylvania Liquor Control Board officers had knowledge or information that a late model black four-door Plymouth Sedan was delivering liquor into Pennsylvania from a dealer in South Jersey and where the agents spotted such a car in New Jersey bearing Pennsylvania plates and observed that the car was quite low in the rear and where these observations were made on December 16 which was at a time when the officers might well believe illegal liquor would be transported into Pennsylvania from New Jersey to meet the demands of the holiday trade, did the officers have reasonable and probable grounds to stop the vehicle in Pennsylvania and search it?

COUNTER-HISTORY OF THE CASE

On December 16, 1960, at 6:30 a.m. on the Admiral Wilson Boulevard in Camden, New Jersey, two enforcement officers of the Pennsylvania Liquor Control Board observed a 1958 Plymouth sedan bearing a Pennsylvania registration plate and the car was quite low in the rear. The officers followed the car over the bridge into Philadelphia, Pennsylvania and then stopped and searched the car and found it to be loaded with 375 bottles of liquor and wine, not bearing the seal of the Commonwealth of Pennsylvania. The owner and operator of the car stated to the officers that he had arranged to deliver a load of liquor from Margate, New Jersey to Philadelphia, Pennsylvania for $30.00 and that he knew it was illegal but took a chance. The officers seized the car and liquor and arrested the driver of the car. The officer had neither a search nor body warrant (R. 5a-9a). One of the officers had reason to believe that a black, four-door Plymouth sedan was delivering liquor illegally from New Jersey into Pennsylvania (R. 10a, 11a). The Commonwealth of Pennsylvania filed petitions for forfeiture of the car and liquor in the Court of Quarter Sessions of Philadelphia and after hearing the trial judge held that the seizure of the car was founded upon evidence illegally obtained and dismissed the petition for forfeiture (R. 28a). Although the trial judge stated in his opinion that there was no testimony that the instant automobile is a four-door, black Plymouth sedan (R. 23a), it is apparent from the testimony of the officer that the instant car does, in fact, meet this description (R. 10a, 11a).

The Commonwealth of Pennsylvania appealed to the Superior Court of Pennsylvania which reversed the lower Court and directed forfeiture of the car.

The owner of the car then appealed to the Pennsylvania Supreme Court which affirmed the decision of the Superior Court. The Pennsylvania Supreme Court held that the validity and propriety of the search were not at issue by reason of the nature of the proceeding, i.e., a forfeiture procedure. The Pennsylvania Supreme Court Opinion concluded:

> "The legislature has seen fit to declare the non-existence of property rights in any automobile used in the illegal transportation of liquor and that such an automobile is contraband. Under the decisional law of both federal and state courts, supra, we are satisfied that, even if the instant automobile had been illegally seized, such fact would not preclude the instant civil proceeding of forfeiture.[4]"

> "[4]We do not, nor need we, for the reasons set forth in this opinion, pass upon the validity of the seizure of this automobile. The validity of such seizure is of no moment in this proceeding."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the Constitutional and Statutory Provisions set forth in Petitioner's brief, the following apply in the instant case:

The Twenty-first Amendment to the Constitution of the United States provides in Section 2:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The Pennsylvania Liquor Code, Act of April 12, 1951, P. L. 90, Purdons Pennsylvania Statutes Annotated, Title 47, Section 491, provides in pertinent part as follows:

> "It shall be unlawful—
>
> "(2) For any person, except a manufacturer or the board or the holder of a sacramental wine license or of an importer's license, to possess or transport any liquor or alcohol within this Commonwealth which was not lawfully acquired prior to January first, one thousand nine hundred and thirty-four, or has not been purchased from a Pennsylvania Liquor Store or in accordance with the board's regulations. The burden shall be upon the person possessing or transporting such liquor or alcohol to prove that it was so acquired . . ."
>
> "(4) For any person, except a manufacturer or the board or the holder of an importer's license, to

have or keep any liquor, except wine, within the Commonwealth unless the package (except the decanter or other receptacle containing liquor for immediate consumption) in which the liquor is contained while containing that liquor bears the official seal of the board as originally affixed in accordance with the provisions of this act or the regulations of the board . . .''

ARGUMENT

1. Contraband which has been seized by the State should not be returned to a claimant.

The Twenty-first Amendment to the Constitution of the United States prohibits the transportation or importation into any State in violation of the laws thereof. The laws of Pennsylvania provide in the Liquor Code, Section 491 (2) and (4) that it shall be unlawful, with certain inapplicable exceptions, for any person to possess or transport any liquor within the Commonwealth which has not been purchased from a Pennsylvania Liquor Store or to have any liquor within the Commonwealth unless the package in which the liquor is contained bears the official seal of the Liquor Control Board. The Liquor Code, in Section 601, declares that no property rights shall exist in any liquor illegally possessed or in any vehicle used in the illegal transportation of liquor and that the same shall be deemed contraband and may be forfeited.

The evidence clearly shows that the liquor was unlawfully imported, transported and possessed in Pennsylvania in the vehicle which was the subject of the forfeiture proceedings. This is not denied by Petitioner whose complaint is limited to the method by which the evidence was obtained. Petitioner contends that the search and seizure of the car was unreasonable and that the evidence thus obtained must be excluded as it would be in a criminal prosecution. Thus, the Petitioner requests that contraband in which no property rights exist under Penn-

sylvania law should be returned to the claimant. The vehicle is just as much contraband as the liquor which was transported in the vehicle yet it is significant that forfeiture of the liquor is not contested.

The clear distinction between application of the exclusionary rule in criminal cases and in cases involving forfeiture procedure for condemnation of contraband is fully covered in the well reasoned opinion of the Pennsylvania Supreme Court.

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2. In the instant case there was reasonable cause for search and seizure by a Pennsylvania Liquor Control Board officer.

Considering the totality of circumstances the search of the vehicle in question was based on reasonable and probable cause.

Your Honorable Court held in the case of *Carroll v. United States*, 267 U.S. 132 (1925), at pages 159, 160, that the Court is bound to take notice of public facts and geographical positions. It is general knowledge that liquor consumption rises at the holiday season. Further, it is general, local knowledge that liquor prices are higher in the monopoly State of Pennsylvania than they are in the adjacent State of New Jersey and that New Jersey liquor is illegally brought into Pennsylvania over the Camden, New Jersey-Philadelphia, Pennsylvania bridges.

The enforcement officers had information that a black four-door late model Plymouth sedan was delivering liquor from New Jersey into Pennsylvania. The incident in this case occurred on December 16 which was at a time when

the officers might well believe that liquor was being transported into Pennsylvania from New Jersey to meet the heavy demands of the holiday trade. The officers saw this late model black four-door Plymouth at 6:30 a.m. and observed that the car was riding quite low in the rear. They followed the car from New Jersey across the bridge into Pennsylvania where they stopped the car, searched the car, found a large quantity of liquor which did not bear Pennsylvania seals, seized the liquor and the car and arrested the driver who admitted he was paid $30.00 to transport the liquor from New Jersey into Pennsylvania. The evidence presented by the officers was not contradicted and there is no factual question involved.

The provisions of the Constitution of Pennsylvania which secures the citizens against unreasonable search and seizure does not apply to property, the possession of which had been absolutely prohibited by statute (*Commonwealth v. Rubin,* 82 Pa. Superior Ct. 315). While this case was decided under the prohibition act, it is just as illegal to have liquor purchased in New Jersey in a car in Pennsylvania today as it was to have untaxed liquor during prohibition days.

In this case, we are concerned with the forfeiture of a motor vehicle and not a motion to suppress evidence in a criminal case. The forfeiture of this motor vehicle is not criminal (*Commonwealth v. One* 1927 *Graham Truck,* 165 Pa. Superior Ct. 1 (1949)).

The leading case in this field is *Carroll v. United States,* supra, in which Federal officers stopped and searched a car they knew to be involved in bootlegging. The officers had no warrants, but seized liquor found in the automobile. In upholding this search and seizure, the Court said at page 149:

> "On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that if, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid."

Again, at page 153:

> ". . . the guaranty of freedom from unreasonable search and seizure by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect to which a proper official warrant readily may be obtained and a search of a ship, motor, wagon or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."

Thus, the rule has been established that a motor vehicle may be stopped and searched, without a warrant, if the officer has probable cause to believe that it contains property which is subject to seizure.

Regardless of the type of case, the rule is that if a search and seizure without a warrant is made with probable cause, that, is, upon a belief, reasonably arising out of circumstances known to the seizing officer that an automobile or other vehicle might contain that which by law is subject to seizure and destruction, the search and seizure are valid.

In this case, we have more than the bare fact that the car "was low in the rear, quite low." We have the

fact that the officers knew that the trade in liquor in New Jersey for transportation into Pennsylvania was quite brisk at this time which was prior to the Christmas holiday. They were looking for a car similar to the one they followed and stopped. They spotted the subject car in New Jersey and followed it for over fifteen minutes before stopping it. The trailing of the automobile began on the New Jersey side of the bridge and proceeded into Philadelphia where the car was stopped. The time is also important. It was 6:45 in the morning when they stopped the car (R. 5a, 6a).

The search for and seizure of stolen or forfeited goods or goods liable to duties and concealed to avoid the payment thereof are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained or using them as evidence against him. In the one case the government is entitled to the possession of the property; in the other, it is not. The seizure of stolen goods is authorized by the common law and the seizure of goods forfeited for a breach of revenue laws or concealed to avoid the duties payable on them has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by the Internal Revenue Acts of the United States from the commencement of the government and are also authorized in the Liquor Code. In fact the Liquor Code in Section 209 specifically authorizes the search of a vehicle without a warrant upon reasonable and probable cause. This section of the Liquor Code, as does the Fourth Amendment of the Federal Constitution, recognizes the necessary difference between the search of a store, dwelling house or other structure in respect to which a proper official warrant readily may

be obtained and a search of a ship, motor boat, wagon or automobile for contraband goods.

The only requirement is that the officer shall have reasonable or probable cause for believing that the automobile which he stops has contraband liquor therein which is being illegally transported. All the facts in this case when taken together certainly show that the officers had this reasonable cause. The Court in deciding and also the appellate court in reviewing the case is bound to take notice of public facts and geographical positions.

The court must consider the location of the car when it was first observed, the fact that it was 6:30 in the morning and the fact that the incident occurred right before the Christmas holidays as well as the fact that the officers knew a similar car was engaged in the transportation of liquor from New Jersey. The test is that if the facts and circumstances before the officers are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient: *Carroll v. United States* (supra). Certainly what is a reasonable search and seizure is not to be determined by any fixed formula nor is the state court, in view of the decision of *Mapp v. Ohio*, 367 U.S. 643, prevented from applying its own rather than a federal criteria of "reasonableness" in determining whether a particular search and seizure was reasonable. Reasonableness of a search must be determined on an ad hoc basis (*Commonwealth v. Bosurgi*, 411 Pa. 56; *Commonwealth v. Cockfield*, 411 Pa. 71).

3. Are the Pennsylvania Courts bound by the United States Supreme Court standards of "reasonable cause" in search and seizure cases?

In *Ker v. California*, 374 U.S. 23 (1963), 10 L. Ed. 2d 726, 83 S. Ct. , the United States Supreme Court made clear that the principles which it enunciates governing the admissibility of evidence in federal trials are derived not only from the Constitution but also from the rules of evidence formulated by that court in its supervisory authority over federal courts. The opinion in Ker emphasized that the United States Supreme Court has not assumed such supervisory authority over state courts and that there has been "no total obliteration of state laws relating to arrests and searches in favor of federal law."

In the instant case it has been established that the Commonwealth is confronted with a law enforcement problem which becomes increasingly difficult as the State boundaries are approached. At the state boundary lines the probability of cars containing liquor being brought into the State illegally is greater than in the interior portions of the State. As the "probability" increases, the test of "reasonableness" should be varied. Where, as here, a heavily weighted car has just come into the State in the dark of an early hour of the morning, there is "reasonable probability" that the car may contain contraband liquor and, therefore, "reasonable cause" for the officers to search for contraband.

CONCLUSION

The right of the Commonwealth of Pennsylvania to regulate the importation and transportation of liquor within its borders is secured to the State by the Twenty-first Amendment to the Constitution of the United States. In the proper regulation of the importation and transportation of liquor the laws of the Commonwealth provide that vehicles used in the illegal transportation of liquor shall be deemed contraband in which no property rights shall exist. Condemnation and forfeiture of such contraband provides a salutory and efficient means of controlling the liquor traffic and the return of contraband to a claimant would violate Pennsylvania law and public policy.

The opinion of the Pennsylvania Supreme Court in this case amply demonstrates that the rules of evidence pertaining to search and seizure in criminal prosecutions have no application to proceedings in rem for the forfeiture of contraband. However, the evidence further shows that in this case there was reasonable and probable cause for the officers to stop and search the contraband vehicle.

The Commonwealth of Pennsylvania submits that the petition should be denied.

Respectfully submitted,
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IN THE

Supreme Court of the United States

October Term, 1964.

No. 294.

ONE 1958 PLYMOUTH SEDAN,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

On Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF FOR PETITIONER.

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IN THE

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Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The opinions of the Supreme Court of Pennsylvania (R. 29-36) are reported at 414 Pa. 540, 201 A. 2d 427. The opinions of the Superior Court of Pennsylvania (R. 20-29) are reported at 199 Pa. Superior Ct. 428, 186 A. 2d 52. The opinion of the Court of Quarter Sessions of Philadelphia County (R. 13-19) is unreported.

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was entered on April 21, 1964 (R. 29). A timely petition for reargument was denied on June 30, 1964 (R. 36). The petition for a writ of certiorari was filed on July 17, 1964, and was granted on December 7, 1964 (R. 37). The jurisdiction of this Court rests on 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED.

1. May state officers, acting without a search or body warrant, stop and search an automobile solely on the ground that the automobile is riding low in the rear?

2. Are agents of a state permitted to stop and search automobiles and travelers at state borders, without a warrant and without probable cause, to ascertain whether such travelers are bringing property into the state upon which a state tax is due?

3. Is evidence which has been obtained by an unreasonable search and seizure, and thus must be excluded in a criminal case, likewise to be excluded in a proceeding by a state to forfeit an automobile allegedly used in the transportation of untaxed liquor?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

The Pennsylvania Liquor Code provides in pertinent part:

"§ 2-209. Officers and investigators of the board to be peace officers; powers

. . . [O]fficers and investigators shall have power and authority, upon reasonable and probable cause, to search for and to seize without warrant or process, except in private homes, any liquor . . . unlawfully . . . imported or transported, and any . . . vehicles . . . which are or have been used in the unlawful . . . importation or transportation of the same. Such liquor . . . or . . . vehicles . . . so seized shall be disposed of as hereinafter provided." 1951, April 12, P. L. 90, art. II, § 209, PA. STAT. ANN. tit. 47, § 2-209.

"§ 6-601. Forfeiture of property illegally possessed or used

No property rights shall exist in any liquor . . . illegally manufactured or possessed, or in any . . . vehicle . . . used in the illegal manufacture or illegal transportation of liquor . . . and the same shall be deemed contraband and proceedings for its forfeiture to the Commonwealth may, at the discretion of the board, be instituted. . . . No such property when in the custody of the law shall be seized or taken therefrom on any writ of replevin or like process." 1951, April 12, P. L. 90, art. VI, § 601, as amended, 1956, April 20, P. L. (1955) 1508, § 1, PA. STAT. ANN. tit. 47, § 6-601 (Supp.).

"§ 6-602. Forfeiture proceedings

* * *

(e) At the time of said hearing, if the Commonwealth shall produce evidence that the property in question was unlawfully possessed or used, the burden shall be upon the claimant to show (1) that he is the owner of said property, (2) that he lawfully acquired the same, and (3) that it was not unlawfully used or possessed.

In the event such claimant shall prove by competent evidence to the satisfaction of the court that said liquor, alcohol or malt or brewed beverage, or still, equipment, material, utensil, vehicle, boat, vessel, container, animal or aircraft was lawfully acquired, possessed and used, then the court may order the same returned or delivered to the claimant; but if it appears that said liquor, alcohol or malt or brewed beverage or still, equipment, material or utensil was unlawfully possessed or used, the court shall order the same destroyed, delivered to a hospital, or turned over to the board, as hereinafter provided, or if it appears that said vehicle, boat, vessel, container, animal or aircraft was unlawfully possessed or used, the court may, in its discretion, adjudge same forfeited and condemned as hereinafter provided." 1951, April 12, P. L. 90, art. VI, § 6-602, as amended, 1956, April 20, P. L. (1955) 1508, § 1, PA. STAT. ANN. tit. 47, § 6-602 (Supp.).

STATEMENT OF THE CASE.

On January 23, 1961, the Commonwealth of Pennsylvania filed a petition in the Court of Quarter Sessions of Philadelphia County alleging that it had seized a 1958 Plymouth sedan automobile in the possession of George McGonigle and that the automobile had been used in violations of the Pennsylvania Liquor Code. The petition prayed that the court adjudge the automobile forfeited to the Commonwealth of Pennsylvania (R. 1-2). A hearing was held on July 18, 1961, which was directed to the circumstances under which the automobile was stopped and searched. The testimony revealed that two enforcement officers of the Pennsylvania Liquor Control Board, who had no search or body warrant (R. 6), followed the automobile across the bridge from Camden, New Jersey, to Philadelphia, Pennsylvania, and halted it a short distance within Philadelphia (R. 5). A search into the rear and trunk of the automobile turned up 375 bottles of known brand liquor which did not contain Pennsylvania tax seals (R. 5, 6). Neither officer had seen this automobile or McGonigle prior to this occasion (R. 6-8). Officer Reitman testified that his only reason for following and stopping the automobile was that it was quite low in the rear and that all he acted on was a suspicion (R. 6-7). Officer Snyder testified that his testimony was the same as Reitman's, with the addition that he had reason to believe that a late model, black, four-door sedan Plymouth was delivering liquor illegally into Pennsylvania from South Jersey (R. 8). However, the trial judge, observing that there was no testimony that the automobile in question was a four-door, black, Plymouth sedan, rejected Snyder's additional testimony as a basis for probable cause (R. 16, 19).

At the conclusion of the hearing an oral application was made to dismiss the petition on the basis that the Commonwealth's evidence was obtained as a result of an

unreasonable search and seizure prohibited by the Fourth and Fourteenth Amendments (R. 10). Specifically, it was contended that the officers of the Liquor Control Board, who had no search or body warrant, did not have probable cause to stop the automobile in which they found the liquor (R. 9-12). The trial judge made a specific finding of fact that the officers' sole basis for stopping the automobile was that it was low in the rear (R. 18-19). He concluded that the seizure was illegal and that the evidence flowing therefrom should have been excluded under *Mapp v. Ohio*, 367 U. S. 643 (R. 19). Accordingly, the Petition for Forfeiture was dismissed (R. 2-3).

The Commonwealth appealed to the Superior Court of Pennsylvania which, by a 4-3 decision, reversed the order dismissing the petition. The Superior Court made no specific determination that the officers had probable cause to stop the automobile and search therein, but rather based its decision on the following principle:

> "A state should have the right to stop a traveler coming into the state and to search his belongings to ascertain whether he is bringing into the state any property upon which a state tax is due. The Commonwealth of Pennsylvania has a sales tax, a liquor tax and a cigarette tax, and if its officers may not stop vehicles coming into the state to ascertain whether its laws are being violated, law enforcement will be greatly impeded." (R. 23)

The two dissenting opinions asserted that the Constitution of the United States does not permit travelers to be indiscriminately stopped at state borders without cause or reason (R. 25, 26-28).

Your petitioner thereupon appealed to the Supreme Court of Pennsylvania, raising the Fourth Amendment question of the reasonableness of the search and seizure and also the question of whether the Superior Court's disposition of the case denied liberty of travel without due process of law. The Supreme Court permitted the Superior

Court judgment to stand. In affirming, the Supreme Court held that it need not reach the question of the validity of the search and seizure since, in its opinion, the federal constitutional guarantees relating to unlawful searches, arrests and seizures in criminal proceedings were not applicable in a forfeiture proceeding (R. 30, 31). One Justice wrote a concurring opinion dealing with certain procedural aspects of forfeiture proceedings (R. 35) and Justice Musmanno dissented without opinion (R. 34). A timely petition for reargument was denied (R. 36).

SUMMARY OF ARGUMENT.

The officers who stopped the automobile in question did so upon the sole ground that it was riding quite low in the rear (R. 19). This single fact would not cause a man of reasonable caution to believe that liquor not bearing Pennsylvania tax stamps was being transported in the automobile. The stopping was therefore unconstitutional under the Fourth and Fourteenth Amendments and all evidence obtained thereby is unavailable to the government in a court of law, whether in a criminal, civil or quasi-criminal proceeding. This rule of exclusion is to be applied in a forfeiture proceeding, which is quasi-criminal in nature although civil in form. If the exclusionary rule were inapplicable in a forfeiture proceeding, the government would thereby be permitted to benefit from its own wrongful conduct.

The automobile is not *per se* contraband, as distinguished from narcotics, counterfeit plates, or even illegal liquor; it is rendered contraband only if its illegal use has been legally established. It is therefore only derivatively contraband; but its allegedly illegal use cannot be proved in a court of law, since the only evidence available to prove its derivative illegality was obtained in an unconstitutional manner and is hence inadmissible in a court of law. Just as the illegally seized alcohol cannot be introduced against the driver of the automobile, likewise the alcohol cannot be introduced against the automobile itself.

The public is not hurt by this application of the exclusionary rule. The question before the Court is not whether the liquor (whose possession may be against public policy) should be returned but whether the automobile supposedly used to transport it (and whose possession is not against public policy) should be forfeited.

ARGUMENT.

I.

The Officers Did Not Have Probable Cause to Stop the Automobile and Search Inside.

McGonigle's automobile was stopped and searched by two state officers armed with neither a search warrant nor a body warrant (R. 6). Consequently, the constitutional validity of the stopping depends on whether or not the officers had probable cause to so act. *Beck v. Ohio,* 379 U. S. 89, 91. The first officer to testify forthrightly stated that he had acted upon suspicion (R. 7). *Cf. Henry v. United States,* 361 U. S. 98, 104. His suspicion was based solely on the fact that the car was riding quite low in the rear (R. 7). The other officer offered the precise testimony as the first (R. 8), with the addition that by prior observation he had reason to believe that a late model, black, four-door sedan Plymouth was delivering liquor illegally into Pennsylvania. Significantly, the trial judge found for two reasons that this additional factor could not be considered in determining probable cause. First, he found no testimony that the car in question fit the description of the car previously observed by the officer (R. 16). Second, the trial judge found as a fact that this additional factor was a "factual falsity" (R. 19). He therefore concluded that the sole reason for stopping McGonigle's car was that it was low in the rear (R. 19). It must be remembered that these findings of fact of the state trial court are of the utmost significance upon review of a determination of probable cause. *Ker v. California,* 374 U. S. 23, 33; *Beck v. Ohio,* 379 U. S. 89, 100-101 (Dissenting opinion of Mr. Justice Harlan).

On the record as outlined above, did the state meet its burden of showing that at the moment of the stopping the facts and circumstances within the officers' knowledge

and of which they had reasonably trustworthy information were sufficient to warrant a man of reasonable caution in believing that the automobile contained contraband liquor? *Carroll v. United States*, 267 U. S. 132, 162. If we accept the finding of fact of the trial court that the sole reason for stopping McGonigle's car was that it was quite low in the rear, the lack of probable cause is an irresistible conclusion.[1] However, even if the additional testimony of the second officer is considered, the facts fall far short of supporting a conclusion of probable cause. Just as the officer in *Beck v. Ohio, supra*, left it a mystery as to what his informer told him about Beck, so too did the officer in the instant case fail to state what he observed about the four-door, black Plymouth and when he observed it. All the officer really imparts is his conclusion that he had reason to believe some other car was illegally transporting liquor. Without supporting and connecting facts, this protestation is valueless. A magistrate would have been remiss in issuing a warrant on such testimony. *Aguilar v. Texas*, 378 U. S. 108.

It remains to deal with the following theory of the Superior Court of Pennsylvania:

> "A state should have the right to stop a traveler coming into the state and to search his belongings to *ascertain* whether he is bringing into the state any property upon which a state tax is due. The Commonwealth of Pennsylvania has a sales tax, a liquor tax and a cigarette tax, and if its officers may not stop vehicles coming into the state to *ascertain* whether its laws are being violated, law enforcement will be greatly impeded." (R. 23) (Emphasis added.)

The simple answer lies in the words of Mr. Chief Justice Taft in *Carroll v. United States*, 267 U. S. 132, 153-154:

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1. *Cf. United States v. Valentine*, 202 F. Supp. 677 (E. D. Tenn. 1962); *Emite v. United States*, 15 F. 2d 623 (5th Cir. 1926).

"It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highway to the inconvenience and indignity of such a search . . . . [T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."[2]

Petitioner having been stopped by Pennsylvania officers in a manner offensive to the Constitution of the United States, the tangible evidence[3] and statements[4] obtained as a result thereof would appear by that same authority to be unavailable to the state government proceeding against the petitioner in a court of law. Nevertheless, it has been held by some courts, including the court below (R. 30, 31), that in a civil forfeiture proceeding the Fourth Amendment exclusionary rule must be ignored.[5]

In the case at bar, the court below held that the constitutional rule of exclusion of illegally obtained evidence only applies to criminal cases and that forfeiture proceed-

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2. Even if the Pennsylvania Superior Court is correct in suggesting that a state should have the right to obstruct interstate travel in order to protect its revenue, it does not follow ineluctably that the remedy for discovery of taxable items should be the conviction of the transporter or the forfeiture of his automobile. The remedy for the evil sought to be corrected lies in a procedure for the collection of the taxes, not punishment of the transporter.

3. *Mapp v. Ohio*, 367 U. S. 643.

4. *Wong Sun v. United States*, 371 U. S. 471, 485-486.

5. Besides ignoring the exclusionary rule, the court below also ignored section 2-209 of the Pennsylvania Liquor Code (reproduced above under "Constitutional and Statutory Provisions Involved"), which empowers enforcement officers to make searches and seizures without a warrant, except in private homes, *"upon reasonable and probable cause."* (emphasis added).

ings are not criminal cases but rather civil proceedings *in rem* (R. 31). Thus, by the mere labeling of the form of action, without an analysis of the true nature of the case, the rule of *Mapp v. Ohio*, 367 U. S. 643, was effectively avoided in this matter.

II.

The Fourth Amendment Exclusionary Rule Must Be Applied in a Proceeding to Forfeit a Person's Property.

A. *A Forfeiture Proceeding Is Penal or Quasi-Criminal in Nature.*

To say that the Fourth Amendment is without impact in a forfeiture action simply because a forfeiture action procedurally lies *in rem* is to oversimplify the issue. Moreover, such an argument ignores the landmark authority of this Court in *Boyd v. United States*, 116 U. S. 616.

It is not an insignificant coincidence that the *Boyd* case came to this Court not as a criminal case, but in the posture of an action by the United States to forfeit thirty-five cases of plate glass. Under constitutional attack was an order of the District Judge compelling the claimants of the plate glass to produce certain records which would aid the United States in proving its case. The order was entered pursuant to section 5 of the Act of June 22, 1874,[6] which provided in pertinent part as follows:

> "In all suits and proceedings *other than criminal* arising under any of the revenue laws of the United States, the attorney representing the government, whenever in his belief any business book, invoice, or paper belonging to . . . the defendant or claimant will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice or paper, and setting forth the allegation which he expects to prove; and thereupon the court . . . may, at its discretion, issue a notice to the de-

6. 18 Stat. 187, 19 U.S.C. 535.

> fendant or claimant to produce such book, invoice, or paper in court . . .; and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper . . . the allegations stated in the said motion shall be taken as confessed . . .." (Emphasis added.)

This Court carefully and deliberately framed the issue in the *Boyd* case as whether the compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws, constituted an unreasonable search and seizure within the meaning of the Fourth Amendment of the Constitution.[7] *Boyd v. United States, supra* at 622. The Court recognized that it was dealing both with an act which expressly excluded criminal proceedings from its operation and with a case not technically a criminal proceeding, and that neither, therefore, was within the literal terms of the Fourth and Fifth Amendments. *Boyd, supra* at 633. Undisturbed by these apparent obstacles, the Court observed:

> "We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal." *Boyd, supra* at 633-634.

Mr. Justice Bradley reasoned that forfeiture of property is actually a penalty affixed to a criminal act, and that its civil form could not disguise its criminal nature and by such device deprive a claimant of his immunities as a citizen. *Boyd, supra* at 634. He concluded as follows:

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7. At first blush, this issue appears to involve the Fifth Amendment privilege against self-incrimination rather than the Fourth Amendment prohibition against unreasonable search and seizure. However, the *Boyd* Court considered the Fourth and Fifth Amendments as "running almost into each other." *Mapp v. Ohio*, 367 U. S. 643, 646.

> "As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution . . ." *Boyd, supra* at 634.

Finally, in rejecting a distinction that a forfeiture proceeding lies *in rem* against the goods rather than *in personam* against the claimant, it was said:

> "But where the owner of the property has been admitted as a claimant, we cannot see the force of this distinction; nor can we assent to the proposition that the proceeding is not, in effect, a proceeding against the owner of the property, as well as against the goods; for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited; and to require such an owner to produce his private books and papers, in order to prove his breach of the laws, and thus to establish the forfeiture of his property, is surely compelling him to furnish evidence against himself." *Boyd, supra* at 637.

The *Boyd* case, decided in 1866, survives to this day as unquestionable precedent. *United States v. $5,608.30 in United States Coin and Currency,* 326 F. 2d 359 (7th Cir. 1964); *Berkowitz v. United States,* No. 6411, C. C. A. 1, January 6, 1965, at page 5. It would be presumptuous for this writer to attempt to improve upon the passages quoted above, which so eloquently pierce the argument that evidence obtained in violation of the Fourth Amendment is admissible in a forfeiture proceeding due to its civil form. Suffice it to say that the substantial, if not the only, purpose in confiscating an automobile used to violate the liquor laws of Pennsylvania is that of punishment to the law violator. Certainly the state has no interest in removing

the particular automobile from society.[8] This becomes quite clear in the light of the Pennsylvania Liquor Code's provision for *mandatory* forfeiture of liquor, stills, equipment, material and utensils unlawfully possessed or used, as compared with *discretionary* forfeiture of vehicles unlawfully possessed or used.[9] See *Commonwealth v. One 1959 Chevrolet Impala Coupe*, 201 Pa. Super. Ct. 145, 147-48. In this connection the following language of the Pennsylvania Superior Court is particularly enlightening:

> "It seemed to the court below that to make this man pay the sum of $500.00 in fines, together with the costs of the proceeding and the storage cost for the automobile, was *sufficient punishment* under all the circumstances. To forfeit a 1959 Chevrolet Impala coupe in addition to the above seemed to the court below to be entirely out of proportion to the crime involved. We cannot say that the court below abused its discretion in so acting." *Commonwealth v. One 1959 Chevrolet Impala Coupe*, 201 Pa. Super. Ct. 145, 150. (Emphasis added.)

B. *The Reasons Supporting the Exclusionary Rule in Criminal Cases Are Equally Applicable to Forfeiture Proceedings.*

Lurking in the federal circuits is an apparent confusion as to the general impact of the Fourth Amendment in forfeiture cases.[10] This confusion has been created by the failure of some courts to recognize that two separate and distinct issues have been raised when illegally seized property

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8. In federal forfeiture cases, Congress has provided that *innocent* parties, such as lienholders, may have a forfeited automobile returned to them. Act of June 25, 1948, 62 Stat. 840, 18 U.S.C. 3617.

9. Act of April 12, 1951, P. L. 90, art. VI, § 602, as amended, Pa. Stat. Ann. tit. 47, § 6-602(e) (supp.) (Reproduced above under "Constitutional and Statutory Provisions Involved").

10. See *United States v. One 1963 Cadillac Hardtop*, 220 F. Supp. 841, 842 (E. D. Wisc. 1963); *Cleary v. Bolger*, 371 U. S. 392, 403 (Concurring opinion).

is sought to be forfeited. One issue is whether the illegal seizure of the *res* ousts the court of jurisdiction to enter a decree of forfeiture. The other issue is whether the evidentiary fruits of a Fourth Amendment violation are admissible to prove that the property has been illegally used or possessed and is thus subject to forfeiture under the applicable statute.[11] It is only the latter issue that is presented in the instant case. Just as a lawful arrest is not essential to a court's jurisdiction over a criminal defendant,[12] neither is a legal seizure essential to a court's jurisdiction over the *res* in a forfeiture case.[13] But, just as evidence obtained as the result of an illegal arrest, search and seizure is inadmissible to prove that a criminal defendant is guilty and subject to pronouncement of sentence,[14] so too should such tainted evidence be inadmissible to prove that a man's property has been used in a forbidden manner and is thus subject to a decree of forfeiture.

The various reasons stated by this Court in support of the Fourth Amendment exclusionary rule in criminal cases are equally applicable to proceedings to forfeit a man's property. If a man's house is truly his castle and is not to be invaded by the government even for the praiseworthy purpose of bringing the guilty to punishment,[15] does that castle suddenly become a grass hut, pervious to intrusion, simply because the government wishes to prove that a man's property is subject to forfeiture? The rights of privacy and personal security against arbitrary police in-

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11. This latent confusion is brought to the surface in *United States v. $5,608.30 in United States Coin and Currency*, 326 F. 2d 359 (7th Cir. 1964), wherein the court noted that while the District Court in a forfeiture action has jurisdiction over an illegally seized *res*, it must nevertheless rule on a motion to suppress. *$5,608.30* at 361, 362.

12. *Frisbie v. Collins*, 342 U. S. 519.

13. *Dodge v. United States*, 272 U. S. 530, 532.

14. *Weeks v. United States*, 232 U. S. 383; *Mapp v. Ohio*, 367 U. S. 643; *Wong Sun v. United States*, 371 U. S. 471, 485.

15. *Weeks v. United States*, 232 U. S. 383, 390, 393.

trusion—which the Fourth Amendment protects and guarantees—are fundamental rights, considered by this Court as implicit in the concept of ordered liberty. *Wolf v. Colorado*, 338 U. S. 25, 27-28. Are these guarantees conditioned on the form of action the government has in mind when it chooses to invade a man's privacy? To hold these rights so conditioned would be to establish a gross anomaly in the law. In *Elkins v. United States*, 364 U. S. 206, this Court emphasized the importance of looking to the *effect* of Fourth Amendment violations when it observed that "to the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer."[16] Quite similarly, it matters not to the victim whether his constitutional right has been invaded for indictment purposes or for libel for forfeiture purposes.

A major purpose of the exclusionary rule is to "compel respect for the [Fourth Amendment] guaranty in the only effectively available way—by removing the incentive to disregard it."[17] Is such respect engendered if police officials may have carte blanche authority to stop and search automobiles entering a state to ascertain if they are perhaps subject to forfeiture? Another purpose underlying the exclusionary rule is to avoid the ramifications of the government's committing crimes in order to secure the conviction of a criminal. Mr. Justice Brandeis said that even those ends do not justify the means.[18] *A fortiori*, the ends of a decree of forfeiture of an automobile do not justify such means. And is the court any less of an accomplice in the willful disobedience of the law when if permits tainted evidence to come before it in a forfeiture case than it would be sitting on the criminal side?[19] The answer is clearly no.

This Court said in *Mapp v. Ohio*, 367 U. S. 643, 655, that if the exclusionary rule was not a sanction which states

16. *Elkins v. United States*, 364 U. S. 206, 215.

17. *Id.* at 217.

18. *Olmstead v. United States*, 277 U. S. 438, 485 (Dissenting opinion).

19. *Cf. McNabb v. United States*, 318 U. S. 332, 345.

must impose to enforce the Fourth Amendment, then the Amendment would become a mere form of words not worthy to be considered "implicit in the concept of ordered liberty." It is both logical and correct in principle that the philosophy of *Mapp v. Ohio* be applied to cases of the type at bar. Otherwise, the asymmetry in the law which *Mapp* was supposed to put to an end[20] will once again appear. Moreover, if *Mapp* is not extended to the forfeiture situation, it cannot remain at its present weight and significance in American constitutional law—it can only retreat. This is because law enforcement officers would then feel free to completely disregard the Fourth Amendment under the guise that they are searching with their civil hats on rather than their criminal hats. Thus, the police actions which this Court in *Mapp* deemed "highhanded"[21] and "roughshod"[22] could be repeated by a police announcement at Miss Mapp's door that they are not there to arrest her, but only to forfeit any obscene books she may have.

Mapp v. Ohio promised that it would

> "close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right [of privacy], reserved to all persons as a specific guarantee against that very same lawless conduct." *Mapp, supra* at 654-655.

We urge that that last door be kept secure, rather than be partially jimmied to gain entrance to the court of forfeiture.

C. *An Illegal Seizure Does Not Become Legal by Government Ratification.*

We must consider certain language in some of the opinions of this Court which has led lower courts, including the court below (R. 31-32), to abandon the exclusionary

20. See concurring opinion of Mr. Justice Douglass in *Mapp v. Ohio*, 367 U. S. 643, 670.

21. *Mapp v. Ohio, supra* at 644.

22. *Id.* at 645.

rule in forfeiture cases.[23] In *United States v. One Ford Coupe*, 272 U. S. 321, it was held that the validity of a seizure for forfeiture purposes was not impaired although the seizure was made by the wrong official; *viz.*, the prohibition director rather than an internal revenue officer. The Court's theory was as follows:

> "It is settled that where property declared by a federal statute to be forfeited because used in violation of federal laws is seized by one having no authority to do so, the United States may adopt the seizure with the same effect as if it had originally been made by one duly authorized." 272 U. S. at 325.

It is the above-quoted language which some courts have taken as a message from this Court that the exclusionary rule is inapplicable in forfeiture cases. Of course, the *One Ford* Court was in no way concerned with the effect on a forfeiture proceeding of an alleged Fourth Amendment violation. Likewise, *Dodge v. United States*, 272 U. S. 530, 532, cited by the court below (R. 32), was merely concerned with the effect of a seizure of liquor made by a municipal police officer rather than the officers designated by the National Prohibition Act. Petitioner submits that the wrong person making an otherwise reasonable search and seizure is constitutionally innocuous compared with the horrors of a search and seizure without probable cause. In the *Dodge* case itself, Mr. Justice Holmes recognized the clear distinction between the wrong officer situation and the unreasonable search and seizure situation. He reasoned that in the former situation the owner of the property suffers nothing that he would not have suffered had the authorized agent made the seizure, whereas "if the search and seizure are unlawful as invading personal rights secured by the Constitution those rights would be infringed yet further if the evidence were allowed to be used." *Dodge, supra* at 532.

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23. *E.g., United States v. Carey*, 272 F. 2d 492 (5th Cir. 1959).

The *One Ford* and *Dodge* cases were explained and limited to their own facts in *Cook v. United States*, 288 U. S. 102. In *Cook*, a British ship was seized by the United States and forfeited, contrary to the provisions of a treaty between the two countries. The United States Government contended that the illegality of the seizure was immaterial, citing the ratification doctrine of forfeiture cases as announced in the *Dodge* case. The Court said, in limiting *Dodge*:

> "The objection to the seizure is not that it was wrongful merely because made by one upon whom the Government had not conferred authority to seize at the place where the seizure was made. The objection is that the Government itself lacked the *power* to seize." *Cook, supra* at 121.

Similarly, the government has no *power* to seize except in a manner permitted by the Fourth Amendment as interpreted by this Court. Moreover, it is submitted that the language in *One Ford* and *Dodge* cannot be extended to the illegal search and seizure situation when read in the light of this Court's subsequent decision in *Elkins v. United States*, 364 U. S. 206, which, in a word, applied the exclusionary rule to the "silver platter" device.

D. *Property Which Is Derivatively Contraband, as Opposed to Being Contraband Per Se, Must Be Returned to Its Owner if Its Illegal Use Can Only Be Proved by Use of Evidence Obtained as a Result of an Unreasonable Search and Seizure.*

Superficially troublesome is the language of this Court in *United States v. Jeffers*, 342 U. S. 48, and *Trupiano v. United States*, 334 U. S. 699, which led the Third Circuit Court of Appeals to announce the following dictum:[24]

> "The sum of Jeffers and Trupiano is that the body of law relating to unlawful searches, arrests and seiz-

24. Converted into a holding by the court below (R. 32-33).

ures in criminal proceedings is without impact in a libel for forfeiture action which is an *in rem* proceeding." *United States v. $1,058.00 in United States Currency*, 323 F. 2d 211, 213 (3rd Cir. 1963).

Jeffers and *Trupiano* were not forfeiture cases, but did mention, in passing, that although the property respectively involved was suppressible as evidence in a criminal case it could not be returned to the defendant since it was contraband. *Jeffers, supra* at 54; *Trupiano, supra* at 710. However, it is important to recall that the property involved in *Jeffers* was narcotics and the property involved in *Trupiano* was "a still, alcohol, mash and other equipment." *Trupiano, supra* at 703. If the narcotics were returned to the possession of Jeffers, he would then be committing the very crimes for which he had been convicted, for Section 2553(a) of the Internal Revenue Code of 1939 made possession of unstamped drugs prima facie evidence of crime and the Narcotic Drug Import and Export Act [25] deemed possession of a narcotic drug sufficient evidence to authorize conviction unless the defendant satisfactorily explained his possession. Similarly, if the still, alcohol and mash were returned to the possession of Trupiano, he would then be committing some of the very crimes with which he was charged,[26] for section 2803(a) of the Internal Revenue Code of 1939 made possession of unstamped distilled spirits a crime and section 2810(a) of the same Code made possession of an unregistered still or distilling apparatus a crime. It is thus apparent that the nature of the property involved in *Jeffers* and *Trupiano* was such that it could have no legitimate existence in the hands of the person seeking return thereof. On the other hand, mere possession of an automobile which

25. 42 Stat. 596, 21 U. S. C. 174.

26. The crimes charged against Trupiano are not enunciated in this Court's opinion nor in the opinions of the courts below. 163 F. 2d 828; 70 F. Supp. 764. Counsel for petitioner ascertained the charges from the complaint filed against Trupiano, reproduced in his Petition for Certiorari at page 3 thereof.

has been used to transport illicit liquor is not of itself a criminal offense. If the automobile in question in the instant case were to be returned to McGonigle, his possession of that automobile would not be a crime or give rise to any statutory presumption of criminal activity. One might say that the type of property involved in *Jeffers* and *Trupiano* is "contraband *per se*", whereas an automobile is only "derivatively contraband" upon proof of its illegal use.

In *Carroll v. United States*, 267 U. S. 132, 156, a case involving the stopping of a car containing illicit liquor, the Court very clearly said that if the car was stopped without probable cause, the owner would have a right to its return. Much more recently, in *Berkowitz v. United States*, No. 6411, C. C. A. 1, January 6, 1965, the First Circuit Court of Appeals indicated that the restoration of illegally seized property depends on the nature of the property involved. *Berkowitz* reversed a decree of forfeiture of currency used in violating the federal revenue laws because the currency was seized in violation of the claimant's Fourth Amendment rights. The court noted, however, citing *United States v. Jeffers*, 342 U. S. 48, 54, that a violation of the Fourth Amendment "should not prevent forfeiture of property the possession of which is *per se* contrary to public policy, as, for example, counterfeiting plates, or narcotics." *Berkowitz, supra* at 13.

This type of analysis provides an explanation to this Court's dictum in *Jeffers* and *Trupiano* now under inspection. It is submitted that this Court did not intend to establish a general rule that all property which is subject to suppression as evidence in a criminal case, but which also has been labeled as contraband by statute, may not be returned to its owner. It is more than likely that it was revolting and intolerable to this Court, as it would be to all men, to hand out narcotics and stills on a silver platter. Indeed, the *Jeffers* Court was well aware of a congressional policy to "prevent the spread of the traffic in drugs."[27]

27. *Jeffers, supra* at 54.

Petitioner is aware of no such legislative policy with respect to automobiles, a commodity which is readily available by the mere signing of a credit application.

Once one concludes that this Court's language in *Jeffers* and *Trupiano* was not meant to prohibit the return of all articles labeled "contraband", without regard to their inherent nature, the problem remains as to just what may be returned following a successful motion to suppress, or just what may be forfeited to the government irrespective of the method by which it obtains possession. In the forfeiture situation, one side of the spectrum would include property which is *per se* offensive and subject to destruction. The clearest example of an item to be relegated to this infamous category would be a counterfeiting plate, which can only be "up to no good". Less clear, but still considered "*per se* contrary to public policy" in *Berkowitz v. United States, supra,* would be narcotics, which are hardly ever "up to any good."[28] As suggested by the above analysis of the *Jeffers* and *Trupiano* cases, any property which it is a crime to possess, such as a machine gun in Pennsylvania,[29] could be considered *per se* offense, as well as property the possession of which raises the presumption of the commission of crime, such as the still involved in *Trupiano*.[30] On the other side of the spectrum would be items which are by common experience intrinsically unoffending, and which can only be proven "guilty" by extrinsic evidence. Obvious candidates for this category

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28. In *Yee Hem v. United States,* 268 U. S. 178, 184, this Court noted that legitimate possession of opium is "highly improbable".

29. Act of June 24, 1939, P. L. 872 § 629, Pa. Stat. Ann. tit. 18, § 4629.

30. Of course inclusion of articles in the *per se* category by virtue of being a crime to possess or by virtue of their possession raising a presumption of crime would be subject to the qualification that the statute causing such result be within the police power of the legislature. As to obscene books, for example, see *Smith v. California,* 361 U. S. 147.

are currency, which was permitted to be returned to its owner in *Berkowitz v. United States, supra,* and automobiles, which, we urge, should be permitted to be returned to the owner in the instant case. It is certainly no more repugnant to public policy to return articles of this nature to their owner if the extrinsic proof of their guilt has been illegally obtained by the government than it is to set criminals free because the "constable has blundered."[31]

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed with directions that the Order of the Court of Quarter Sessions of Philadelphia County dismissing the Commonwealth's Petition for Forfeiture be reinstated.

Respectfully submitted,

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31. *Cf. People v. Defore,* 242 N. Y. 13, 21, 150 N. E. 585 (1926).

IN THE

Supreme Court of the United States

October Term, 1964
No. 294

ONE 1958 PLYMOUTH SEDAN,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Does petitioner have the right of return of contraband seized by State Authority and forfeited pursuant to State Statutes?

2. Is the question of reasonable cause for search and seizure before the Court for review?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following additional Constitutional and Statutory Provisions apply in the instant case:

The Twenty-first Amendment to the Constitution of the United States provides in Section 2:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The Pennsylvania Liquor Code, Act of April 12, 1951, P. L. 90, as amended, Purdons Pennsylvania Statutes Annotated, Title 47, provides in pertinent part as follows:

Section 4-491:

"It shall be unlawful—

> "(2) For any person, except a manufacturer or the board or the holder of a sacramental wine license or of an importer's license, to possess or transport any liquor or alcohol within this Commonwealth which was not lawfully acquired prior to January first, one thousand nine hundred and thirty-four, or has not been purchased from a Pennsylvania Liquor Store or in accordance with the board's regulations. The burden shall be upon the person possessing or transporting such liquor or alcohol to prove that it was so acquired. . . ."

"(4) For any person, except a manufacturer or the board or the holder of an importer's license, to have or keep any liquor, except wine, within the Commonwealth unless the package (except the decanter or other receptacle containing liquor for immediate consumption) in which the liquor is contained while containing that liquor bears the official seal of the board as originally affixed in accordance with the provisions of this act or the regulations of the board. . . ."

Section 6-601:

"No property rights shall exist in any—vehicle—used in the illegal transportation of liquor, alcohol or malt or brewed beverages and the same shall be deemed contraband and proceedings for its forfeiture to the Commonwealth may, at the discretion of the [Liquor Control] board, be instituted in the manner hereinafter provided. . . ."

Section 6-602(a):

"(a) The proceedings for the forfeiture or condemnation of all property shall be in rem, in which the Commonwealth shall be the plaintiff and the property the defendant. . . ."

Section 6-603:

". . . . if it appears that any vehicle . . . was so used in the illegal manufacture or transportation of liquor, alcohol, or malt or brewed beverages, such property may in the discretion of the court, be adjudged forfeited and condemned. . . ."

STATEMENT OF THE CASE

On December 16, 1960 at 6:30 a.m. two enforcement officers of the Pennsylvania Liquor Control Board stopped a 1958 Plymouth sedan in Philadelphia, Pennsylvania, and found in the rear of the car and in the trunk 375 bottles of liquor and wine not bearing the official seal of the Pennsylvania Liquor Control Board (R. 5). The officers seized the car and liquor. The Commonwealth of Pennsylvania filed petitions for forfeiture of the car and the liquor in the Court of Quarter Sessions of Philadelphia County and, after hearing, the trial judge dismissed the petition for forfeiture of the automobile but upheld the forfeiture of the liquor (R. 2, 3).

The Commonwealth of Pennsylvania appealed to the Superior Court of Pennsylvania which reversed the lower Court and ordered that the 1958 Plymouth sedan be forfeited and condemned (R. 24).

The owner of the car then appealed to the Pennsylvania Supreme Court, which affirmed the forfeiture decreed by the Superior Court, but based its decision on grounds other than those stated in the opinion of the Superior Court. The Pennsylvania Supreme Court held that since the legislature has declared no property rights to exist in any automobile used in the illegal transportation of liquor the same is contraband. The Court affirmed the order of forfeiture and condemnation of the said automobile (R. 34).

The petitioner thereupon petitioned Your Honorable Court for a Writ of Certiorari which was granted (R. 37).

The records in the proceedings before all courts reveal:

> "On December 16, 1960 two enforcement officers of the Pennsylvania Liquor Control Board were stationed on the Admiral Wilson Boulevard in New Jersey, the approach to the Benjamin Franklin Bridge leading into Philadelphia, Pennsylvania. At 6:30 a.m. on the above date the officers saw a black Plymouth four-door sedan, bearing Pennsylvania registration plates, approaching the bridge. The car was quite low in the rear and the officers followed the car across the bridge into Philadelphia and on Vine Street, west of Sixth Street, in Philadelphia, the officers stopped the car, identified themselves and questioned the operator, George McGonigle. In the rear of the car and in the trunk the officers found 375 bottles (31 cases) of high priced whiskey and wine not bearing Pennsylvania tax seals. The operator of the car, McGonigle, stated to the officers that he had been hired to deliver this liquor from Margate to Philadelphia for $30.00, that he knew it was unlawful but took the chance. McGonigle made no objection to the search of the automobile. The car and liquor were seized and McGonigle was arrested. The officers had neither a search nor a body warrant."

SUMMARY OF ARGUMENT

The automobile, the subject herein, is contraband. At the time of its seizure in Pennsylvania, it contained 375 bottles of liquor which did not bear the seal of the Pennsylvania Liquor Control Board which were being transported within Pennsylvania. Under Pennsylvania law, both the liquor being possessed and transported as well as the vehicle are contraband and the legislature has declared no property right to exist therein.

Pursuant to the Pennsylvania Liquor Code the petition for condemnation of the vehicle is an action in rem, in which the Commonwealth of Pennsylvania is the plaintiff and the vehicle is the defendant. This is not a motion to suppress evidence in a criminal proceeding and the exclusionary rule does not apply. To hold otherwise might require delivery to a claimant of contraband in which the law has declared that no property rights exist.

The Pennsylvania Supreme Court specifically stated that it was not passing upon the validity of the seizure of the vehicle which was condemned as contraband and, therefore, this question is not presented to the United States Supreme Court for review.

ARGUMENT

1. Contraband Which Has Been Seized by the State Should Not Be Returned to Claimant

The Twenty-first Amendment to the United States Constitution prohibits the transportation or importation into any state of the United States for delivery or use therein of intoxicating liquor in violation of the laws of that state. This amendment to the Constitution grants to the states the right to prohibit or to regulate the transportation of intoxicating liquor unlimited by the commerce clause, the equal protection clause and/or the due process clause of the United States Constitution. Your Honorable Court in the *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U. S. 391, 394 (1944) stated as follows:

> "Since the Twenty-first Amendment, as held in the Young case, the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause; and, as held by that case and Mahoney v. Joseph Triner Corp., 304 U. S. 401, discrimination between domestic and imported intoxicating liquors, or between imported intoxicating liquors, is not prohibited by the equal protection clause. The further claim that the law violates the due process clause is also unfounded. The substantive power of the State to prevent the sale of intoxicating liquor is undoubted. Mugler v. Kansas, 123 U. S. 623."

See also *California v. Washington*, 358 U. S. 64 (1958).

The Pennsylvania legislature, pursuant to the authority granted to it in the Twenty-first Amendment and in the exercise of its legislative function, enacted legislation which provides that "No property rights shall exist in any . . . vehicle . . . used in the . . . illegal transportation of liquor, alcohol or malt or brewed beverages, and the same shall be deemed contraband and the proceedings for its forfeiture to the Commonwealth may, at the discretion of the [Liquor Control] Board, be instituted in the manner hereinafter provided . . .".

It was pursuant to this Pennsylvania statute, known as section 601 of the Pennsylvania Liquor Code, that the Commonwealth of Pennsylvania instituted an action against the instant vehicle for condemnation and forfeiture of said vehicle.

The action filed was in rem pursuant to section 602(a) of the Pennsylvania Liquor Code which states:

> "The proceedings for the forfeiture or condemnation . . . shall be in rem, in which the Commonwealth shall be the plaintiff and the property the defendant . . .".

Since the petitioner under the above statutes has no property rights in the subject herein, he therefore has no right to the return thereof.

Your Honorable Court, in the case of *Trupiano v. United States*, 334 U. S. 699, 710; 68 S. Ct. 1229, 92 L. Ed. 1663 (1948), stated as follows:

> "It follows that it was error to refuse petitioners motion to exclude and suppress the property which

was improperly seized. But since the property was contraband, they have no right to have it returned to them."

The Fourth Circuit Court in 1958 reiterates the theory set forth by your Honorable Court in the above case by stating in the case of *United States v. One 1956 Ford Tudor Sedan*, 253 Fed. 2d 725, 726, 727 (4 Cir. 1958), as follows:

> "Legal infirmities in the seizure do not impair the right of the United States to condemn or clothe the former owner with property and possessory rights he lost, when he used the property in violation of the revenue laws. Consideration which in criminal cases require the suppression of evidence obtained in an unlawful search or seizure have no application here."

The United States Court of Appeals for the Third Circuit in *United States v. $1058.00 in United States Currency*, 323 Fed. 2d 211 (1963), held that contraband even though unlawfully seized may nevertheless be forfeited, although it may be suppressed and excluded as evidence in criminal proceedings. It cited with approval *United States v. One Ford Coupe*, 272 U. S. 321, which almost forty years ago set forth the same doctrine where Mr. Justice Brandeis speaking for the Court had said:

> "It is settled that where property declared by a federal statute to be forfeited because used in violation of federal laws is seized by one having no authority to do so, the United States may adopt the seizure with the same effect as if it had originally been made by one duly authorized."

Dodge v. United States, 272 U. S. 530, affirmed the reasoning in the One Ford Coupe case and held that the seizure of a boat by an unauthorized person would not preclude the Government from bringing a subsequent action for its condemnation and sale but indicated that the evidence could not be used in a criminal proceeding.

The case of *Cook v. United States*, 288 U. S. 102, cited by petitioner (petitioner's brief p. 20) has no bearing on the matter here at issue as that case concerned the interpretation of a treaty between the United States and a foreign power and did not involve the manner of seizure but the basic lack of power in the Government to make a seizure. In the instant case it is clear that the state has the power to make the seizure but petitioner challenges the manner of exercising the power.

The applicable law promulgated by your Honorable Court and the United States Courts of Appeal was recognized by the Pennsylvania Supreme Court in stating the crux of the question presented for review as follows (R. 31):

> "The Court below refused to decree a forfeiture in the instant case because, inferentially at least, it believed that the rule of exclusion of evidence illegally obtained applied in this proceeding, even though not a criminal proceeding. In this respect the Court erred."

The Pennsylvania Supreme Court disposed of the question by concluding (R. 34):

> "The legislature has seen fit to declare the non-existence of property rights in any automobile used

in the illegal transportation of liquor and that such an automobile is contraband. Under the decisional law of both federal and state courts, supra, we are satisfied that, even if the instant automobile had been illegally seized, such fact would not preclude the instant civil proceeding of forfeiture.'"

In reaching this conclusion, the Pennsylvania Supreme Court stated as follows (R. 31):

> "The statute, upon which this proceeding is based, mandates that no property rights shall exist in an automobile used in the illegal transportation of liquor and declares an automobile engaged in such use shall be deemed to be contraband. Articles of contraband are things and objects outlawed and subject to forfeiture and destruction upon seizure: 17 C.J.S. 510. 'It is the use to which the property is put that renders property, otherwise lawful, rightful to have, use and possess, subject to seizure and forfeiture': Hemenway & Moser Co., et al. v. Funk, et al., 100 Utah 72, 106 P. 2d 779. The purpose for which the thing or article is used acts as the criterion for the classification of such thing or article as contraband or non-contraband."

It is apparent that the Federal and State Courts have for good cause distinguished between criminal prosecution and forfeiture proceedings in applying the exclusionary rule.

The reasons for the exclusionary rule in criminal cases do not apply to actions in rem for the forfeiture of contraband. In the one case the prosecutor seeks to invade

a person's privacy to obtain evidence to be used against him. In the other case the Government seeks only to take possession of articles which the law has declared to be contraband in which no property rights exist.

Petitioner seeks to distinguish between "contraband per se" and "derivative contraband" (petitioner's brief p. 20). However, the Twenty-first Amendment to the United States Constitution returns to the several states complete authority and control of intoxicating liquors and the Pennsylvania Liquor Code in section 601 declares that no property rights shall exist in any liquor illegally possessed or in any vehicle used in the illegal transportation of liquor and declares that the same are contraband. The law makes no distinction and, therefore, the liquor illegally possessed and the vehicle used for illegal transportation are both "contraband per se". It is the use to which the property is put that renders property, otherwise lawful, subject to seizure and forfeiture: *United States v. Ryan,* 284 U.S. 167 at 176.

In *Carroll v. United States,* 267 U.S. 132, cited by petitioner, the Court did not pass upon the question of the application of the exclusionary rule in forfeiture cases in rem.

The Pennsylvania Supreme Court (R. 33) cites *United States v. Carey,* 272 F. 2d 492, which points out the proper distinction between obtaining evidence for a criminal prosecution and a seizure of forfeited property and holds that an illegal search and seizure would not defeat the Government's action for forfeiture.

Petitioner cites the case of *Boyd v. United States,* 116 U.S. 616 (petitioner's brief, pp. 12-14) for the proposition

that in criminal prosecutions and civil actions brought by the Government any property seized by officers in violation of the Fourth Amendment is to be excluded from the evidence. However, the issue in the Boyd case concerned the legality of the compulsory production of personal papers for use as evidence. In that case the Government was [redacted] trying to obtain evidence, not the contraband itself and the Court discussed the distinction at page 623:

> "The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto caelo*. In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government. The first statute passed by Congress to regulate the collection of duties, the act of July 31, 1789, 1 Stat. 29, 43, contains provisions to this effect. As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable', and they are

not embraced within the prohibition of the amendment."

It, therefore, appears that the Boyd case expressly refutes the proposition advanced by petitioner.

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2. The Question of Reasonable Cause for Search and Seizure Is Not Properly Presented for Review

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In affirming the judgment of forfeiture the Pennsylvania Supreme Court Opinion concluded (R. 34):

> "The legislature has seen fit to declare the nonexistence of property rights in any automobile used in the illegal transportation of liquor and that such an automobile is contraband. Under the decisional law of both federal and state courts, supra, we are satisfied that, even if the instant automobile had been illegally seized, such fact would not preclude the instant civil proceeding of forfeiture."

> "We do not, nor need we, for the reasons set forth in this opinion, pass upon the validity of the seizure of this automobile. The validity of such seizure is of no moment in this proceeding."

As the question of the validity of the seizure has not been determined by the highest court of the Commonwealth of Pennsylvania, it is not before the United States Supreme Court on review; however, respondent submits that considering the totality of circumstances, the search of the vehicle in question was based on reasonable and probable cause.

In the case of *Carroll v. United States*, 267 U.S. 132, at pages 159, 160, it was held that the Court is bound to take notice of public facts and geographical positions. It is general knowledge that liquor consumption rises at the holiday season. Further, it is general knowledge locally that liquor prices are higher in Pennsylvania than in New Jersey and that liquor from New Jersey is illegally brought into Pennsylvania over the Camden, New Jersey-Philadelphia, Pennsylvania bridges.

The incident in this case occurred on December 16, at 6:45 a.m., when the officers might well believe that liquor was being transported into Pennsylvania from New Jersey to meet the heavy demands of holiday trade. The officers observed a car in New Jersey bearing Pennsylvania plates and that the car was riding quite low in the rear. They followed the car over the bridge into Pennsylvania, where they stopped it and found that it contained a large quantity of liquor which did not bear Pennsylvania seals and the driver admitted that he was paid to transport the liquor from New Jersey into Pennsylvania (R. 4-7). The evidence presented by the officers was not contradicted.

The test is that if the facts and circumstances before the officers are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient: *Carroll v. United States* (supra). Certainly what is a reasonable search and seizure is not to be determined by any fixed formula nor is that State Court, in view of the decision of *Mapp v. Ohio*, 367 U.S. 643, prevented from applying its own rather than a federal criteria of "reasonableness" in determining whether a particular

search and seizure was reasonable. Reasonableness of a search must be determined on an ad hoc basis (*Commonwealth v. Bosurgi*, 411 Pa. 56; *Commonwealth v. Cockfield*, 411 Pa. 71).

CONCLUSION

The control of alcoholic beverages has for centuries posed a serious problem for state governments. General recognition of the latent dangers attending unlawful traffic in intoxicating liquors has prompted the adoption of laws designed to curtail such traffic by providing that vehicles used in the unlawful transportation of alcoholic beverages shall be deemed contraband in which no property rights exist. Where such contraband comes into the State's possession it should be decreed forfeited in a civil action in rem brought by the State pursuant to State law. The exclusionary rules of evidence which have been formulated for criminal cases should not apply to such forfeiture proceedings.

Wherefore, it is respectfully submitted that the judgment of the Supreme Court of Pennsylvania should be affirmed.

Respectfully submitted,

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